

UNITED STATES OF AMERICA

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FEDERAL COMMUNICATIONS COMMISSION

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PUBLIC FORUM ON

RIGHTS-OF-WAY ISSUES

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WEDNESDAY,

OCTOBER 16, 2002

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The Public Forum was held at 445 12th Street,
S.W., Washington, D.C. 20554, at 9:30 a.m.

COMMISSIONERS PRESENT:

MICHAEL POWELL, CHAIRMAN
KATHLEEN ABERNATHY
MICHAEL COPPS
KEVIN MARTIN

EMCEE:

K. DANE SNOWDEN, CHIEF, CONSUMER & GOVERNMENTAL
AFFAIRS BUREAU

ALSO PRESENT:

NANCY VICTORY, ASSISTANT SECRETARY FOR COMMUNICATIONS
AND INFORMATION, U.S. DEPARTMENT OF COMMERCE

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PANEL I:

JANE MAGO, MODERATOR

LISA GELB, DEPUTY CITY ATTORNEY, SAN FRANCISCO,
CALIFORNIA

CHRIS MELCHER, CORPORATE COUNSEL, QWEST COMMUNICATIONS

PAM BEERY, PARTNER, BEERY & ELSNER

TERESA MARRERO, SENIOR ATTORNEY - FEDERAL ROW ISSUES,
AT&T

PANEL II:

BILL MAHER, MODERATOR

SANDY SAKAMOTO, ASSISTANT GENERAL COUNSEL AND
ASSISTANT ATTORNEY SBC/PACIFIC TELESIS

DON KNIGHT, ASSISTANT CITY ATTORNEY, DALLAS, TEXAS

KELSI REEVES, VICE PRESIDENT, FEDERAL GOVERNMENT
RELATIONS, TIME WARNER TELECOM

LARRY DOHERTY, DIRECTOR, SITE DEVELOPMENT, WEST
REGION, SPRINT PCS

BARRY ORTON, PROFESSOR OF TELECOMMUNICATIONS,
UNIVERSITY OF WISCONSIN □ MADISON

PANEL III:

KEN FERREE, MODERATOR

KEN FELLMAN, MAYOR, ARVADA, COLORADO

DORIAN DENBURG, CHIEF RIGHTS-OF-WAY COUNSEL,
BELLSOUTH, CORPORATION

BOB CHERNOW, CHAIR, REGIONAL TELECOM COMMISSION

ALEXANDRA WILSON, VICE PRESIDENT, PUBLIC POLICY, COX
ENTERPRISES, INC.

BOB NELSON, COMMISSIONER, MICHIGAN PUBLIC SERVICE
COMMISSION

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P-R-O-C-E-E-D-I-N-G-S

9:31 a.m.

MR. SNOWDEN: Good morning. We appreciate your making your way here through our Nor'easter this morning. I'd like to welcome you to the Commission's Public Forum on Rights-of-Way Issues. My name is Dane Snowden, and I'm the Chief of the Consumer and Governmental Affairs Bureau here at the FCC, and it is my pleasure to be the emcee for the day.

As everyone knows, rights-of-way issues have been lurking around for many, many years. They are extremely important issues that often raise considerable emotions among the interested stakeholders. The Commission holds this program today in an effort to facilitate discussion among those interested stakeholders, stakeholders as local authorities, state regulators, and, of course, the industry.

Today, we hope to explore where the stakeholders might develop consensus positions and to identify principles and practices that all parties believe can be a model for access to and management of rights-of-way with respect to the communications industry. We are very excited to have a number of distinguished panelists and guests today, and we thank

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1 you for taking the time out of your busy schedules to
2 be with us.

3 Our discussion today is divided into three
4 different panels. The first panel will address
5 jurisdictional issues relating to local and federal
6 authority and will be moderated by the Commission's
7 general counsel, Ms. Jane Mago. The second panel will
8 address issues relating to fair and reasonable
9 compensation for the use of rights-of-way. Bill
10 Maher, Chief of the Wireline Competition Bureau, will
11 moderate this panel. Our third panel and final panel
12 will be moderated by Ken Ferree, Chief of the Media
13 Bureau, and this panel will be on looking ahead.
14 We're also extremely pleased to have Nancy Victory,
15 Assistant Secretary for Communications and Information
16 at the Commerce Department, provide us with
17 administration's perspective on rights-of-way issues.

18 As you can see from our agenda, we have a
19 lot of ground to cover today, and we will try hard to
20 abide by the schedule that we have established in
21 order to allow everyone a reasonable opportunity to
22 speak. Time permitting, we will allow questions from
23 the audience at the end of each panel. We ask that
24 you keep your questions brief, so that everyone has an
25 opportunity to participate. A number of you may be

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1 flying out this afternoon, so we will try our best to
2 close at the exact time. One final piece of
3 housekeeping: assisted listening devices are available
4 for those that may require one, and should you need
5 one, just let us know.

6 Now it is my pleasure to turn the program
7 over to Chairman Powell, then Commissioners Abernathy,
8 Martin, and Copps, who will each make opening remarks.

9 So without further ado, Chairman Michael Powell.

10 CHAIRMAN POWELL: Good morning to everyone
11 and welcome to the FCC. It's my good fortune and
12 privilege to have you all here. You will make a very
13 critical contribution to continuing policy questions,
14 and I appreciate you taking the time.

15 You know, rights-of-way challenges have
16 been with us forever. I mean, they are ancient in
17 orientation, and there is nothing new about that.
18 They seem to accompany every new iteration of
19 technological progress. Even centuries ago, after the
20 Norman evasion, there was the invention of new forms
21 of agriculture and husbandry, and it was interesting
22 that one of the consequences of that was the rise of
23 hedges used to keep livestock in, and one of the
24 consequences of those hedges, I guess, the
25 foreshadowing of telephone poles they were, in order

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1 to keep livestock in was the closing off of what had
2 become common in roots of passage. Ultimately,
3 hundreds of years later, the government had to come up
4 with a balance, a balance between the rights of
5 property holders and farmers and the rights of the
6 public to transgress rights-of-way.

7 More recently, we saw, certainly with the
8 invention of the telephone, the creation of franchise
9 rights in order to facilitate the construction and
10 deployment of telephone poles, lines, and
11 infrastructure, so there is nothing new about that.
12 And here we are today in another period of
13 unprecedented technological development, which, again,
14 calls on the government and stakeholders to find
15 balance in order to protect the historical importance
16 of rights-of-way while simultaneously facilitating the
17 deployment of new and critical infrastructures that
18 our citizens want and demand.

19 So that's why we are here. We have
20 attempted to gather the various constituencies to
21 focus on the kinds of questions that are presented by
22 current rights-of-way challenges but, most
23 importantly, and I want to emphasize, to focus on
24 solutions. Today, given the limits of time, we
25 necessarily don't have the ability to focus on every

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1 possible right-of-way question. There are many. Many
2 important questions will not be the subject of today's
3 discussion, but it's important to note this is just
4 one installment, one installment of what I envision to
5 be an ongoing and continuing dialogue among these
6 constituents in search of solutions.

7 So today is just as much a beginning as an
8 end. Our goal is to continue this dialogue with every
9 stakeholder that has an interest.

10 You know, historically, state and local
11 governments have had a primary role in the
12 establishment of policy, which must be understood by
13 all and respected by all. They are a vital part and
14 they will continue to be a vital part of any and all
15 solutions. Similarly, however, the Congress of the
16 United States has established an aggressive
17 development blueprint for new infrastructures and new
18 technologies and has commanded all of us to use the
19 tools at our disposal to advance those objectives.

20 These are challenges that we must balance,
21 but I am 100% confident that we can and will strike
22 the right balance between the sovereign prerogatives
23 of states and the paramount objectives of the federal
24 government in a way that benefits all the citizens of
25 the United States.

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1 This is our challenge. I believe it is
2 one that we are up to. I welcome all of you again and
3 look forward to today as a productive installment in
4 that continuing dialogue, as we search for a way to
5 provide new communication services to the citizens of
6 the United States. Thank you.

7 COMMISSIONER ABERNATHY: Thank you, Mr.
8 Chairman. And I'm not as familiar with the historical
9 context around negotiating rights-of-way. I am aware,
10 though, that, for about the past month, I've been
11 negotiating with my daughter for a right-of-way
12 through her bedroom, and I have not been successful
13 yet, but I'm aware of the importance of rights-of-way,
14 and I do want to thank the Chairman for taking a
15 leadership role here, for Dane Snowden and his team
16 for putting this together, for all of the
17 representatives from the states who have taken their
18 time and energy to come together and talk about this
19 very, very important issue.

20 Ensuring rights-of-way access on
21 reasonable terms, clearly, is critical to our effort
22 at the federal level to promote broadband deployment
23 and facilities-based competition. And, at the same
24 time, there is no question that the states and the
25 municipalities, clearly, have a legitimate interest in

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1 regulating use of public rights-of-way and ensuring
2 fair compensation for that use. So what we're talking
3 about really is balancing the interest of service
4 providers and local governments, and this balancing
5 effort has, at times, been very contentious, and I'm
6 afraid sometimes there's been more heat than light in
7 the prior discussions, so I'm hopeful that today's
8 forum will help us reach common ground where consensus
9 is possible. And where there are differences of
10 opinion that cannot be bridged, I'm hopeful we will
11 identify those areas, so we can assess whether
12 intervention by this Commission is necessary or not.

13 Now, the panels, as you're aware,
14 scheduled for today address many of the critical
15 issues surrounding the debate. For example, we need
16 to obtain a clearer sense of the scope of federal
17 jurisdiction. In addition, I'm pleased that there's
18 going to be a discussion of what constitutes fair and
19 reasonable compensation for use of rights-of-way.
20 There's been considerable debate over whether the
21 Communications Act requires cost-based compensation or
22 permits other types of fees, such as fees that are
23 based on a percentage of revenues or on profits, and I
24 think that we will all benefit from hearing the
25 different perspectives on that question, as we

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1 struggle with where we should ultimately end up.

2 Some other topics that I hope will get
3 discussed by the panelists include the appropriate
4 scope of right-of-way regulation and guidelines for
5 timely processing of applications for permits. It
6 doesn't do you much good to have regulations in place
7 if it takes you two years to negotiate the process.
8 And these are areas that have proved contentious, but
9 it would seem that local governments and industry
10 groups could find common ground in developing best
11 practices, and, based on prior discussions I've had
12 with both parties, it seems like this will be a
13 fruitful area of discussion.

14 So I look forward to hearing from the
15 panelists, and I'll be here at different points
16 throughout the day, and I hope this begins a dialogue
17 that will bring us closer to fulfilling the
18 Congressional goal of encouraging the deployment of
19 advanced telecommunications capabilities to all
20 Americans. Thank you very much.

21 COMMISSIONER COPPS: Well, I, too, want to
22 thank the Chairman for convening this panel, to the
23 Bureau for its hard work in putting it together, and,
24 most of all, to all of you for joining us on this wet
25 Wednesday to bring some new thinking to an old

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dilemma: how to open rights-of-way for critically-important infrastructure development without upending painstakingly constructive balances among a host of public sector/private sector interests. It's really, as a chairman, so interestingly depicted in an old kind of problem wrapped in the promise of exciting new technologies, and it cries out for some creative thinking. Maybe we should have called this not the rights-of-way forum but the creative thinking forum. But whatever it is, I'm pleased to see so many people from so many venues here today dedicated to working constructively on solutions. It's a naughty problem; it is not an unsolvable problem.

Broadband, I believe, is central to the rebound of the telecom sector. More than that, it represents an infrastructure built out of historic proportions, and its promise for America is only beginning to be understood. That promise is profound and it is transformative, affecting almost every aspect of how we will live, work, play, care for ourselves, probably even how we will govern ourselves.

All these things will be changed before broadband is through. So any impediments to the rapid deployment of broadband services and broadband networks need to be addressed, tackled, and resolved. One such barrier

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1 highlighted by a variety of providers, incumbents and
2 competitors, cable providers and wireless, as well as
3 by our state colleagues is rights-of-way access.
4 These parties argue that unnecessary constraints on
5 access to public rights-of-way are retarding the
6 deployment of new broadband networks that are integral
7 to America's future. They finger unreasonable fees,
8 unnecessary delays, and even discriminatory treatment
9 of certain competitors in the market as major culprits
10 in broadband's delayed expansion. And there have
11 been, in truth, some horror stories out there.

12 On the other side are governments and, in
13 particular, local governments, emphasizing their
14 historical and legitimate and important role in
15 managing rights-of-way and public lands, as they seek
16 to minimize disruption to their citizens from torn-up
17 streets and the need to obtain appropriate
18 compensation for access to these public resources.
19 This is not a history and a heritage to be lightly
20 considered or to run rough shot over. I believe that
21 the overwhelming majority of local governments are
22 sincerely trying to balance their obligations to
23 manage the public's rights-of-way with their desire to
24 bring new advanced services to their communities. The
25 devil, of course, is in the details, but these thorny

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1 rights-of-way issues do strike me as being ripe for
2 some good public sector and private sector
3 collaboration. Hence, this forum.

4 I love these kinds of initiatives and
5 forums. As a matter of fact, I spent most of my eight
6 years at the Department of Commerce during the Clinton
7 Administration trying to put together partnerships
8 like this, where public sector and private sector
9 representations come together to tackle problems where
10 both industry and government have to be involved, and
11 I'm a believer and a true believer in that kind of
12 cooperative endeavor. When we toss aside all the old
13 shibboleths and fears, we begin to realize that
14 government and the private sector can accomplish a
15 whole lot more by working together than by emphasizing
16 our differences.

17 This kind of, perhaps, non-traditional
18 cooperation is especially useful in the world of
19 broadband, as we move from the established legal
20 framework to an unregulated Title I environment, where
21 there is a lack of clarity and jurisdictions, rights,
22 and obligations, and where we don't have a lot of
23 statutory guidance or regulatory precedence to guide
24 us. But we do have some commonalties. I think we all
25 agree that broadband is important, and we need to get

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1 it deployed. Local, state, and federal governments,
2 generally, all seem to recognize this. Indeed, some
3 local jurisdictions are building their own broadband
4 systems, where the private sector has been reluctant
5 to go in. Broadband is a national priority. Congress
6 told us exactly that in Section 706, which directs us
7 to promote the deployment of advanced services to all
8 Americans.

9 We're also committed, I trust, to the
10 competition that Congress sought to create in the 1996
11 Act. With competition among multiple providers,
12 consumers reap the many benefits of lower prices,
13 better services, and greater innovation.

14 And we all believe, as Americans, that no
15 problem is unsolvable and that for every great
16 national challenge, there is just about always a
17 reasonable, doable solution. Usually, that solution
18 is fashioned and formed through the art of compromise
19 resulting, first, from a clear statement of the
20 problem and then a discussion of alternatives. So I
21 am pleased to see that collaborative efforts are being
22 undertaken in various fora.

23 At the state level, NARUC has established
24 a study committee on public rights-of-way to develop
25 recommendations on these issues, and their work is a

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1 significant contribution to flushing out the issues
2 which must be decided. At the local level, NATOA has
3 played an important role in initiating a dialogue when
4 it convened an advisory counsel to facilitate a
5 cooperative dialogue on rights-of-way issues between
6 municipal governments and service providers. Thanks
7 to them, also.

8 And as for our efforts at the FCC, I first
9 want to commend our local state government advisory
10 committee that has been working with us on these
11 difficult issues. That's a venue of tremendous value
12 for such discussions. Here at the FCC, we have begun
13 to highlight the importance of this issue to the
14 future of broadband deployment on our most recent
15 Section 706 report. We need to keep the spotlight
16 focused on this until the job is done.

17 That brings us to today and this forum.
18 Your challenge is to voice a new thought or, at least,
19 bring consensus to some of the better proposals and
20 practices that have already been deployed or
21 developed. As part of this effort, a good place to
22 begin is to look closely at what diverse communities
23 across this country are doing to tackle the problem,
24 identify lessons learned, and then go on to develop
25 some best practices that can be shared and

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1 implemented. Maybe a few such practices could be
2 developed and used even before a more comprehensive
3 solution is found. Maybe, who knows, best practices
4 is the solution. Even if they are not, sometimes
5 milestones along the way and little deliverables along
6 the way make the road to a more comprehensive solution
7 much easier to travel.

8 This is surely not a problem where some
9 simplified theory of government or one-size-fits-all
10 theory of regulation or a particular ideology holds
11 out any promise at all, so I hope and trust that we
12 can all avoid knee-jerk reactions to one another's
13 suggestions. We need to put all that aside and get a
14 handle on meeting one of the most important challenges
15 we face as a country today, a challenge made even more
16 important by our current economic sluggishness.

17 With a collaborative effort, I am
18 optimistic that we can make great strides to ensure
19 that all Americans have access to the best, most
20 accessible and cost-effective telecommunication system
21 in the world. That's a winner for business, that's a
22 winner for governments and, most important of all, a
23 winner for the American people. So I thank you,
24 again, for being with us today, for listening, for
25 working on this, and good luck to all of you as you

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1 proceed.

2 CHAIRMAN POWELL: Thank you, Commissioner.
3 Commissioner Martin?

4 COMMISSIONER MARTIN: Good morning,
5 everyone. I, first, would like to express my
6 appreciation and gratitude to the chairmen and to Dean
7 Snowden for organizing this and to all the panelists
8 who will be with us today for taking the time out of
9 their busy schedule to come and share some of their
10 experiences and thoughts on this important topic.

11 The availability of advanced
12 telecommunications and broadband is critical to the
13 economy, and particularly in the current downturn, but
14 the economy in general in the 21st Century, and I
15 think that all of us need to do all that we can to
16 continue to promote the broadband deployment. The
17 topic of today's discussion, rights-of-way and the
18 management of those, is critical to encouraging and
19 facilitating the further deployment of advanced
20 services and broadband facilities.

21 The public rights-of-way are an invaluable
22 resource and create the pathway for the nation's
23 telecommunications network infrastructure, and it is
24 used to reach all of our end users, and the access to
25 these vital arteries is critical to the modernizing

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1 and deploying of the distribution and last-mile
2 broadband facilities that will be used throughout the
3 country.

4 Now, I've said many times before that I
5 think it's important that the government, at all
6 levels, should commit itself to trying to exercise
7 self-restraint and placing additional burdens on
8 broadband and then trying to facilitate and streamline
9 all the permeating processes that can sometimes act as
10 a hindrance or deterrents to those deployments. I
11 know that state and local governments and the federal
12 government, to the extent that they're managing
13 federal lands, need to be proactive in trying to
14 facilitate deployment by attempting to streamline
15 those permeating processes, and I, too, look forward
16 to trying to see whether or not there's a series of
17 best practices that can be extracted out of today's
18 meeting that we can try to facilitate and encourage
19 others to adopt.

20 So with that, I particularly look forward
21 to hearing from Nancy Victory this afternoon as she
22 tries to present the administration's proactive
23 efforts on federal rights-of-way policy and, also,
24 particularly pleased and appreciate that Bob Nelson is
25 here with us today. I've been able to see first-hand

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1 his effort and his dedicated leadership in trying to
2 promote cooperation through all of his work at NARUC,
3 and I look forward to hearing what experiences and
4 ideas he has as a result of that effort. And I, also,
5 do appreciate Ken Fellman with us today. I know that
6 his work at LSJC has also been critical, as we try to
7 address these issues.

8 So, again, I think the task of identifying
9 and eliminating potential burdens and trying to
10 facilitate easier management of rights-of-way to
11 facilitate deployment is critical and that we can
12 attempt to try to identify some best practices out of
13 this will be important as an opportunity for us. So I
14 will look forward to having some productive
15 discussions as we go through today. Thank you.

16 MR. SNOWDEN: Thank you very much, Mr.
17 Chairman and commissioners. As we get ready for the
18 next panel, we appreciate you all coming down and
19 speaking with us, and I'm sure you'll be watching it
20 from your offices the rest of the day. As we get
21 ready for our next panel, I wanted to let everyone
22 know that this rights-of-way forum is also being
23 simulcast throughout the Commission, on the internet,
24 and also through George Mason University. So without
25 further ado, it is my pleasure to bring to the podium

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1 Jane Mago, our general counsel, and her panel on the
2 jurisdictional question.

3 MS. MAGO: Thank you. Can I ask the
4 panelists to please come on up. I think Janice will
5 tell you where you're supposed to sit, right? Thank
6 you very much. My name is Jane Mago. I'm the general
7 counsel of the Federal Communications Commission, and
8 this panel today -□ is it not working too well? It's
9 because I'm short, I know.

10 This panel is focused on the scope of the
11 federal authority under Section 253 of the act. We're
12 the lawyers. We're going to talk about the statute
13 and how to figure out, you know, how all of this fits
14 together, just exactly what it is that Congress did in
15 enacting Section 253. And I'm going to start by
16 giving a short, you know, my cast on all of this and
17 then ask each of my panelists to speak for five to
18 seven minutes or so and give their perspective on the
19 issues that we have. And then, hopefully, we're going
20 to open this up to the floor, let you ask a couple of
21 questions. I have some, but I'd like to get some
22 input so that we can focus this on where you, in the
23 audience, are interested in focusing.

24 So let's start. Let me give a quick
25 overview, and I'll start off by saying that Section

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1 253, like so many portions of the 1996 Telecom Act,
2 has a few problems in terms of clarity. To quote the
3 Third Circuit opinion that came out earlier this year,
4 Section 253 is quite inartfully drafted and has
5 created a fair amount of confusion. The Third Circuit
6 is known for understatement.

7 The Commission and, for the most part, the
8 courts have interpreted Section 253(a) as a broad
9 prohibition against barriers to entry. The Commission
10 and courts have also interpreted Section 253(b), which
11 states that the states may still have some authority
12 to regulate in the interest of universal services.

13 And Section 253(c), which provides the
14 state and local governments authority to manage the
15 rights-of-way and require fair and reasonable
16 compensation, is safe harbors to this generalized
17 prohibition. Section 253(d) directs the Commission to
18 preempt any statute, regulation, or legal requirement
19 that violates Sections A or B. There is no mention of
20 Section C in there, and since we are lawyers, what
21 that means is that we automatically start saying, so
22 what does that mean? Perhaps, we should turn to the
23 legislative history; perhaps, we shouldn't; and I
24 think that some of the panelists will be talking to us
25 about that.

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1 There is some legislative history that
2 makes it clear that the deletion of C from D was
3 intentional. It was a kind of a compromise, and I'll
4 let the panelists speak a little bit more about that.

5 Of course, whenever there is this kind of
6 uncertainty, what that means is that we have differing
7 opinions that come out. Now, the Commission, for its
8 part, has not attempted to resolve any rights-of-way
9 disputes under 253(c), although people have tried to
10 bring those to us. We have taken the position that we
11 have the authority to determine whether a particular
12 contention is a bona fide claim under Section 253(c)
13 that would bring us to that preemption, and I think
14 that that will also be a topic of discussion as we go
15 forward here.

16 So the courts, for their part, are split
17 in their opinions. Some think that there is the
18 jurisdiction of the Commission; other says perhaps
19 not. So with that, let me go ahead and let the
20 panelists do the real discussing because you don't
21 want to hear this from me, we want to hear it from
22 them, and start off by saying that our first panelist
23 is Lisa Gelb. Lisa is the Deputy City Attorney with
24 the city of San Francisco, where she specializes in
25 telecommunications and cable matters. Now, some of

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1 you may see Lisa as a familiar face since she spent a
2 fair amount of time here at the Commission. In fact,
3 she was involved in the development of the first local
4 competition rules after the '96 act and also on
5 universal service issues. With that, let me turn this
6 over to Lisa to give us some information.

7 MS. GELB: Thank you, Jane, and I want to
8 thank the FCC, generally, for hosting this forum. I
9 do know from personal experience that a huge amount of
10 work goes into hosting these. I think this is a great
11 opportunity for different views to be aired in one
12 place and one time. I know that the FCC hears
13 frequently from the industry about how things are
14 working or not working regarding industry efforts to
15 enter or continue to provide service in the
16 marketplace. I also know that the FCC hears far less
17 often from local governments about these issues and
18 so, perhaps, is less familiar with all of the concerns
19 and competing interests that local governments are
20 trying to accommodate.

21 The FCC doesn't necessarily understand the
22 impact that local governments face when, for example,
23 a telecom company installing facilities in the rights-
24 of-way hits a water main or a gas pipe or when a
25 telecom company goes bankrupt and abandons its

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1 facilities in city streets. This forum is a great
2 opportunity to start drawing a fuller, more balanced
3 picture of the concerns that local governments face.

4 It's also important to bear in mind that
5 there are countless other parties who have a huge
6 stake in the proper management of public rights-of-
7 way, and those people aren't sitting up here today.
8 They include all of us as individual citizens who use
9 the streets and sidewalks to get to work or school or
10 the grocery store. They include businesses, who
11 critically depend on utilities and other services
12 functioning appropriately at all times. And they
13 include the electrical utilities, water, and sewer
14 service providers, subway and trolley services, and
15 all of the other entities that want to use the streets
16 or put facilities on, above, or below the rights-of-
17 way. Local governments have to balance all of these
18 interests when they set the ground rules for companies
19 that want to place facilities in the streets.

20 Thus, the question local governments face
21 is not simply do we want high-speed broadband services
22 for our citizens. Of course we do. The question is
23 how do we balance the desire for those services with
24 all of the other important interests at stake?

25 As Chairman Powell mentioned, it is useful

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1 to, in analyzing the Telecom Act, and Section 253 in
2 particular, to consider some of the history of right-
3 of-way regulation. Under the Constitution, all rights
4 not expressly delegated to the federal government are
5 reserved to the states, and states, of course, have
6 broad authority to delegate their powers to local
7 governments.

8 States have long recognized that local
9 governments are in the best position to manage the use
10 of local roads and public rights-of-way. For at least
11 150 years, the Supreme Court has upheld the local
12 governments' authority to set rules for private
13 businesses and individuals who want to use the rights-
14 of-way.

15 In 1893, in the city of St. Louis versus
16 Western Union Telegraph, the Supreme Court said if the
17 city gives a right to use the streets or public
18 grounds, it simply regulates the use when it
19 prescribes the terms and conditions upon which they
20 shall be used. The court also said that the word
21 "regulate" is one of broad import.

22 Subsequent decisions, including Blair
23 versus the City of Chicago in 1903, City of Owensboro
24 in 1913, and New Orleans Public Service in 1930
25 confirmed that cities have broad discretion to manage

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1 and regulate public rights-of-way.

2 The kinds of regulations that are being
3 considered right now by courts in Section 253
4 challenges are precisely the kinds of regulations that
5 local governments have been using for years to ensure
6 that rights-of-way are used in a safe and efficient
7 manner and that valuable and limited resources are
8 used in a way that best serves all interested parties.

9 For example, in St. Louis versus Western
10 Union, the Supreme Court found that the city could
11 require a telegraph company to pay compensation as
12 rent for use of the right-of-way and that such
13 requirements simply constituted regulation of the
14 right-of-way. In the city of Owensboro, the Supreme
15 Court recognized that the city's rights to regulate
16 the right-of-way included the right to grant a
17 franchise to the telephone company.

18 In that case, the court also indicated
19 that the city had authority if it chose to exercise it
20 to preclude the company from transferring the
21 franchise to another entity. In Hodge Drive It
22 Yourself Company, a 1932 Supreme Court case, the court
23 held that the city ordinance that required taxi cabs
24 to deposit insurance policies or bonds with the city
25 was also just a mode of the right-of-way regulation.

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1 The point is this: the obligations of this
2 sort have been opposed by local governments for 150
3 years. They've been upheld by the Supreme Court as
4 legitimate right-of-way regulation, and Congress must
5 be presumed to have known of these types of
6 requirements when it created a safe harbor for right-
7 of-way regulation through 253(c). Indeed, it was
8 these types of regulations that Congress was intending
9 to preserve.

10 Finally, it's worth noting that Congress
11 only authorized preemption of regulations that
12 prohibit or have the effect of prohibiting the
13 provision of telecom service. This is a very
14 stringent standard to meet. In other places in the
15 Telecom Act, for example in 251(b)(1) and
16 251(c)(4)(b), Congress made a distinction between
17 prohibitions unless severe restrictions, such as
18 unreasonable conditions or limitations. And in
19 Section 257, Congress talked about barriers to entry,
20 as opposed to prohibitions.

21 Thus, the courts, generally, have not
22 given the appropriately rigorous review to local
23 requirements. Had they done so, they would have, in
24 most, if not all, cases, have concluded that the
25 regulations at issue did not constitute prohibitions

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1 or effective prohibitions on services, and the courts
2 need never have reached the issue of whether the
3 requirements were preserved under Section 253(c).

4 MS. MAGO: An extremely timely
5 presentation, exactly as the red light went on. Truly
6 amazing, Lisa. Our next panelist is Chris Melcher.
7 Chris is the Executive Director for Policy and Law for
8 Qwest Communications, where he is responsible for the
9 municipal relationships and network deployment for the
10 entire Qwest system. As you might guess, he may have
11 a slightly different perspective on this than Lisa,
12 and so let me just turn it over to Chris and let him
13 get started.

14 MR. MELCHER: Thank you, Jane. And I also
15 would like to thank the Commission for having this
16 forum. This is a wonderful opportunity for industry
17 and local, state, and federal government officials and
18 representatives to get together to discuss these
19 issues. These are, as the Chairman and commissioners
20 mentioned, somewhat contentious but extremely
21 important, and I think that today's a great
22 opportunity to find common ground and seek to
23 understand the viewpoints of each side and, hopefully,
24 find that there really aren't two sides, but we're
25 working together on this.

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1 I would like to talk about the
2 jurisdiction issues and focus on 253. I do have some
3 views about the comments of Lisa, which I can share
4 later during Q and A. It's something that I think
5 there's been a lively debate on.

6 Historically, jurisdiction to regulate the
7 rights-of-way has vested in local and, to some degree,
8 state governments. The Telecommunications Act of
9 1996, and Section 253 in particular, do not seek to
10 usurp local governments' jurisdiction over the rights-
11 of-way and transfer it to the federal government.
12 Local governments remain responsible for regulating
13 the management of the rights-of-way. The FCC has
14 recognized this in several prior decisions.

15 TCI Cable Vision of Oakland County,
16 Senator Feinstein recognized this in legislative
17 history, and I want to underscore the industry
18 recognizes this and has recognized this ever since
19 there was an industry. Local governments and
20 municipalities have a critical role in managing the
21 right-of-way, and I think the key issue or the key
22 distinction, really, is managing the right-of-way, not
23 managing telecommunication companies.

24 It has been clear and without debate that
25 the appropriate management of telecommunications

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1 companies is that the federal level with the
2 Commission and at the state level with the state
3 public utility commissions, and some municipalities
4 have endeavored to regulate telecommunication
5 companies. I think that has led to some of the
6 difficulties. But everyone agrees local
7 municipalities have a very important responsibility to
8 regulate the right-of-way.

9 The 1996 Act, in many respects, seeks to
10 balance respect for traditional areas of local
11 regulation with the recognition by Congress that there
12 is a national interest in ensuring the development of
13 competition in all telecommunications markets,
14 including local markets, and that some degree of
15 federal oversight is required to ensure the
16 realization of that national goal.

17 Section 253 preserves local jurisdiction
18 over rights-of-way but with federal oversight. The
19 language of Section 253 clearly indicates that
20 Congress understood that such authority, if exercised
21 over-broadly, could threaten the national policy of
22 encouraging competition and promoting deployment of
23 facilities. Section 253, accordingly, seeks to define
24 the appropriate balance. The Congressional policy of
25 eliminating barriers to the development of competition

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1 is paramount in the Act.

2 Subsection 253(a) bars state and local
3 requirements that prohibit or have the effect of
4 prohibiting the provision of telecom services. I
5 think it's also important to recognize, as the court
6 did in the Ninth Circuit in Auburn and the Second
7 Circuit in White Plains that a Section 253(a)
8 violation does not require that the company is
9 actually completely locked out of the market or has to
10 go bankrupt in order to prove that it is a true
11 barrier. I think the Second Circuit recognized that
12 material limitations on the provision of services do
13 constitute a violation of 253(a), and I think the
14 courts are recognized in that, and I think the
15 Commission has recognized that.

16 Subsection 253(c) creates a safe harbor
17 from the reach of subsection 253(a). While that safe
18 harbor is designed to preserve traditional local
19 jurisdiction of a rights-of-way, it is narrow. A
20 local right-of-way regulation falls within the safe
21 harbor of 253(c) only if it actually relates to
22 management of the public rights-of-way or recovers
23 fair and reasonable compensation for use of the
24 rights-of-way, and it must do so on a competitively
25 neutral and nondiscriminatory basis.

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1 The debate has really focused, or one of
2 the debates has focused on the limits in subsection
3 253(c) and what they mean, who should define them, and
4 who should enforce them. Some cities have suggested a
5 broad reading of 253(c) and a narrow reading of
6 subsection 253(a). I believe what should guide the
7 interpretation and application of the whole of Section
8 253 is the overarching purpose of the '96 Act: the
9 development of telecommunications competition and the
10 deployment of a robust national telecommunications
11 infrastructure. The entire '96 Act is an effort to
12 achieve that goal and gives the FCC authority to guide
13 that process.

14 The FCC has been somewhat cautious to
15 exercise what we believe it's full authority under
16 Section 253 has been given to them and rightfully so.

17 There was a concern that it might, if it acted too
18 quickly, tread on areas of traditional local
19 jurisdiction, but the FCC's jurisdiction to interpret
20 and enforce Section 253 is no different from the FCC's
21 dictating the pricing methodology that guides local
22 wireline competition or various other similar issues.

23 In both cases, Congress indicated that the
24 FCC was to be the ultimate arbiter of what was
25 necessary to remove barriers and ease the way to

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1 competition. In neither case did Congress suggest
2 that all local authority be entirely usurped, and I
3 think enough time has passed that the FCC, the
4 industry, the localities have had a chance to see how
5 the 1996 Act was intended to be implemented, how
6 Section 253 was intended to be implemented, and what
7 are the issues that really need further leadership and
8 guidance under Section 253.

9 Now, some of the debate has also focused
10 on the jurisdiction of the FCC. I would, without
11 going into too much detail, refer everyone to the
12 Second Circuit's opinion in White Plains. I think,
13 and I think a lot of folks agree, that that was a very
14 reasoned review of the interplay between Section
15 253(c) and A and also D, and I gave quite, I thought,
16 a very informative analysis of the FCC's role.

17 The real key point was it would really be
18 something of an oddity in quite awkward if the FCC
19 were allowed to make determinations that there was a
20 253(a) violation but, yet, not be able to make a
21 determination whether or not 253(c) safe harbor
22 applied, and so we think that, clearly, the FCC does
23 have jurisdiction under 253(c), as well as A, and
24 should exercise that jurisdiction where appropriate.

25 I'll close by simply saying that another

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1 key question is how should the FCC meaningfully
2 exercise its jurisdiction under Section 253? As have
3 been recognized by Commissioner Copps and others,
4 there clearly are some abuses. There had been some
5 problems with deployment of facilities around the
6 country. The majority of cities, I think, have worked
7 with the industry quite well, but there are problems,
8 and how do those get handled? The question is when,
9 and we believe the answer is now. The time has gone
10 by, and the economy and the telecommunications
11 industry are very much in need of guidance and need to
12 deploy the broadband facilities necessary for our
13 recovery, and we think the FCC needs to act now on
14 that.

15 How should the FCC act? There are several
16 avenues. The most definitive would be a formal
17 rulemaking. I understand, as the FCC referred to in
18 their brief to the Second Circuit, that there are also
19 certain proceedings going on right now, but we think
20 that the FCC could provide guidance through a policy
21 statement, and that would be extremely useful. The
22 FCC has jurisdiction to do so, and I believe the
23 industry and the localities would benefit if the FCC
24 were to take that opportunity to do so. Thank you
25 very much.

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1 MS. MAGO: Thank you, Chris. Our next
2 panelist is Pam Beery. Pam is a partner in the law
3 firm of Beery & Elsner. Ms. Beery represents the
4 Metropolitan Area Communications Commission, which is
5 a coalition of 14 local governments in Washington
6 County and a number of cities in franchise
7 administration. Cellular facility siting, and renewal
8 negotiations with cable providers are some of the
9 topics that she covers. She was appointed by Chairman
10 Powell to the FCC's local and state advisory committee
11 in January of 2002. Thank you for joining us.

12 MS. BEERY: Thank you. I'd like to begin,
13 as everyone else had, by thanking the Chairman the
14 commissioners for this important opportunity to
15 present local government views on this topic. I
16 especially want to add thanks to Jane Mago for her
17 clear and consistent vision and her careful legal work
18 in this area. I think it's been a real benefit to the
19 dialogue.

20 According to this panel's description, it
21 is our responsibility to provide insights into just
22 what authority the FCC has to regulate the areas of
23 state and local government right-of-way management
24 practices. I will look forward, during the question
25 and answer period, to responding to some of Mr.

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1 Melcher's comments. I've had the benefit of sharing
2 the podium with him many times. I will look forward
3 to that.

4 What I want to do is present another view
5 of Section 253. I want to add Section 601 to that
6 dialogue. As Ms. Mago described, part of our job this
7 morning is to educate, and so I'm going to start with
8 that foundation. I'm going to quickly cover some FCC
9 and court decisions and then cover my basic theme,
10 which is this: the FCC and the courts are operating
11 effectively, currently, based on a well-reasoned view
12 of the sphere of authority that each occupies. Given
13 the vast changes engendered by the Telecommunications
14 Act, it's not really surprising that it would have
15 taken some time for this clear pattern to emerge, but
16 it has emerged. It may not be fully to the liking of
17 all interests, but I believe a full course, a prudent
18 course has been set, and that we need to stay that
19 course.

20 Other speakers have given a good overview
21 of Section 253. What I would like to call folks'
22 attention to is a recent decision out of New Mexico,
23 where the court, I think, very succinctly and
24 accurately described what 253 is all about. The court
25 said that it represents a carefully-crafted balance

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1 between deregulating the telecommunications market at
2 the federal level and preserving state and local
3 authority to regulate in certain prescribed areas.

4 As the other speakers have pointed out,
5 when courts interpret a statute, they first look to
6 its text, and, as Jane has already mentioned, the text
7 leaves some unanswered questions. So, as lawyers,
8 once we get the text in mind, we turn to the
9 legislative history. I have appended to my testimony,
10 which, thanks to NATOA, is available on the public
11 comment table, an exhaustive description of the
12 legislative history. Others have referred to it
13 generally, but I want to make a couple of points about
14 that legislative history.

15 First, it's clear that Congress
16 specifically rejected the notion that local
17 governments needed to travel to Washington, D.C. every
18 time one of their regulations was being disputed, and
19 that's clear in the documents that I've appended to my
20 talk.

21 Second, as Lisa said, it was also clear
22 that Congress intended to leave undisturbed the
23 traditional local authority to manage the rights-of-
24 way. On that topic, we are fortunate, indeed, to
25 have, for the record today, a letter to Chairman

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1 Michael Powell dated October 8 from Congressman Bart
2 Stupak, who, as many of you know, is the author of
3 subsection C, the safe harbor.

4 I just want to read a couple of sentences
5 from Congressman Stupak's letter. Of course, he was
6 the author of subsection C. His statement is, Without
7 the amendment, the bill would have raised serious
8 concerns regarding unfounded mandates, federal
9 intrusion into local authority, and unfair taxpayer
10 burden. My amendment passed the house, and provisions
11 on this issue were ultimately included in the Act.

12 Congress has definitively stated its
13 intent that states and municipalities should have
14 authority over these issues, and I do not believe
15 future additional federal regulation is warranted. I
16 don't know how much clearer you could get than from
17 the author of the Section than that. You might wonder
18 why Congressman Stupak is still interested in this
19 issue so many years later. His wife is the mayor of
20 Menominee, Michigan, and so I'm sure he hears about
21 these issues on a regular basis.

22 One thing I want to add to what Chris said
23 about the FCC. He's suggesting that the FCC, in fact,
24 issue something. Well, the FCC did that. Another
25 issue that is often overlooked is that the FCC did

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1 issue a guideline in 1998. It's widely available.
2 It's called "Suggested Guidelines for Petitions for
3 Ruling Under Section 253." It's starting to be cited
4 to the courts. In the Qwest v. Portland case that I'm
5 currently litigating at the Ninth Circuit, the court
6 was impressed by that document. The court cited to it
7 and relied upon it, and I think we don't need any
8 further guideline. The FCC took that leadership four
9 years ago. So the point that I want to make clearly
10 is - actually, I want to back up for a second.

11 I forgot to mention Section 601. 601 is
12 another Section of the Act that I'm kind of surprised
13 doesn't get cited more often. It's starting to appear
14 in some of the decisions. It was enacted at the same
15 time as 253. It provides specifically that the Act
16 will not be construed to modify, impair, or supercede
17 federal, state, or local law, unless expressly so
18 provided; again, a very clear Congressional statement.

19 I would close by saying that I,
20 surprisingly, to some extent, agree with Mr. Melcher
21 on the White Plains decision. I had a little
22 different spin on what I think the court held there
23 that I'll be happy to share, if we get a chance, in
24 questions. And thank you.

25 MS. MAGO: Our final panelist today is

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1 Teresa Marrero. Teresa is a Senior Attorney with
2 AT&T. She's been practicing in the field of
3 telecommunications law for over 11 years, and she is
4 responsible for AT&T's work on managing federal
5 rights-of-way issues, as well as certain other local
6 competition issues before the FCC. Thank you very
7 much.

8 MS. MARRERO: AT&T's view that the
9 Commission's authority to issue orders preempting
10 state and federal local laws regarding public rights-
11 of-way is broader than the cities assert, and the
12 Commission's preemption jurisdiction is largely
13 concurrent with the federal courts. More importantly,
14 our focus cannot be narrowly limited, however, to the
15 various provisions of Section 253 of the Act because
16 the Commission has broad rulemaking authority under
17 Section 201(b) that can be evoked to create efficient
18 and uniform national solutions to many of the problems
19 that have arisen over rights-of-way access.

20 The cities, generally, take the position
21 that, to the extent barriers to entry, through a
22 barrier to entry claim brought under Section 253 of
23 the Act raises any right-of-way issue the Commission
24 is precluded from deciding the issue. The basic
25 premise that has been laid out by some of the earlier

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1 speakers is that 253 does not expressly address right-
2 of-way management compensation, and 253 reserves
3 certain state and local authority, regardless of
4 253(a). Second, they assert that 253(d) only permits
5 the Commission to preempt state or local requirements
6 that violate 253 A or B but not C. The Commission
7 appears to take a slightly less restrictive position
8 concerning its jurisdictional authority over 253(c).

9 In a supplemental brief filed with the
10 Second Circuit in the White Plains case, the
11 Commission implied that it had concurrent jurisdiction
12 with the courts but only if a 253(c) defense to a
13 claim brought under A does not rise to the level of a
14 bona fide claim to defense. The Commission noted that
15 it had not yet had the occasion to address a bona fide
16 253 defense and, in those instances, believes that it
17 has the discretion to decide not to preempt, even if
18 the action violates Section 253(a).

19 However, the Commission's authority to
20 assert jurisdiction over rights-of-way matters is
21 broader than merely issue a declaratory ruling when C
22 is raised as a defense to A.

23 First, to the extent that rights-of-way
24 issues under 253(c) are presented as defenses to
25 barrier to entry claims under A, the Commission, under

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1 D, has express authority to preempt such violations.
2 This is expressly stated in the Prince George County
3 decision. The Ninth Circuit has also opined on this
4 issue.

5 Second, regardless of the scope of the
6 Commission's adjudicatory authority to preempt
7 specific state and local laws under 253(d), the
8 Commission has broad authority over 201(b) to adopt
9 rules carrying out any provision of the Communications
10 Act, as the Supreme Court found in the Iowa Utilities
11 Board case. This necessarily includes 253(c).

12 In the Iowa case, the state's arguments
13 closely paralleled the city's positions concerning
14 rights-of-way. In the Iowa case, the states argued
15 that, because the Act expressly provides that state
16 commissions shall establish the interconnection and
17 network element rates, that the FCC lacked the
18 jurisdiction to issue rules construing the rate-making
19 requirements of the Act. The Supreme Court rejected
20 the state's argument and held that the FCC, indeed,
21 had authority to issue pricing rules that would be
22 binding upon the states and upon federal courts and
23 appeals cases concerning wholesale pricing issues.

24 Specifically, the Supreme Court held that
25 201(b), which broadly provides that, quote, "The

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1 Commission may prescribe such rules and regulations as
2 may be necessary in the public interest to carry out
3 the provisions of this Act gives the Commission
4 authority to adopt rules implementing all of the
5 provisions of the '96 Act," which, of course, would
6 include Section 253.

7 The Supreme Court, in the Iowa case,
8 rejected the lower court's holding that the
9 Commission's rulemaking authority applies only to
10 statutory provisions that the Commission directly
11 administers. Under this analysis, the city's position
12 that the Commission has no jurisdiction over rights-
13 of-way issues because 253(a) does not expressly
14 mention rights-of-way would be rejected. The Iowa
15 court further held that, even though the states have
16 the express authority under the Act to set the rates
17 for interconnection on network elements, the
18 Commission still has the authority to adopt the
19 binding interconnection and network element pricing
20 rules.

21 Section 201(b) means what it says and
22 explicitly gives the FCC jurisdiction to make rules
23 governing matters over which the 1986 Act applies.
24 Thus, under Iowa, the Commission has jurisdiction to
25 set rules concerning municipalities' rights-of-way

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1 management, regardless of the scope of the
2 Commission's authority under 253(d). The FCC has yet
3 to address the use of Section 201(b) powers in this
4 context, but it should use its authority over rights-
5 of-way issues to set rules that would provide uniform
6 standards by which public rights-of-way may be managed
7 in a competitively neutral and nondiscriminatory
8 manner. These uniform standards should address issues
9 such as what constitutes fair and reasonable fees
10 charged for public rights-of-way, a topic covered by
11 our next panel; the right to gain access to public
12 rights-of-way within a reasonable timeframe; and what
13 constitutes actual use of the rights-of-way.

14 Thank you very much. Thank you for this
15 opportunity, Jane.

16 MS. MAGO: Thank you, Teresa. Well, it
17 sounds like we have some divergent views on the panel,
18 and maybe I should start by taking the lazy moderator
19 approach in saying to the panel does anyone have a
20 specific comment they want to make in response to some
21 of the other comments from the panelists? Lisa, I
22 suspect you have something to say to Teresa about that
23 last point.

24 MS. GELB: Well, actually, I have to
25 confess that there's a certain irony in the Supreme

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1 Court decision jurisdiction ruling now being somehow
2 used against me, since I very much supported the
3 Supreme Court decision when it came out when I was
4 working here. You know, I think it's a nice argument;
5 I don't think it works for a couple of quick reasons.

6 First is, I think, what Pam was saying,
7 which is there's 601. I mean, there's a general
8 presumption, a very, very strong presumption, against
9 preemption, and then there's an explicit declaration
10 that nothing shall be deemed to preempt local, state,
11 or federal jurisdiction or law, except to the extent
12 expressly provided. Clearly, subsection C, I mean,
13 there's a big distinction between A and B and then C
14 in Section 253, so the presumption is it's not simply
15 silent. There's a clear statement that 253 is not to
16 be preempted, at least by the FCC.

17 And I think the other problem is you're
18 really mixing two provisions. 251 is a provision that
19 was designed □- you know, I went back to look at it as
20 she was speaking. One thing is it's an affirmative
21 obligation to set up rules of the road that have never
22 been established. Section 253 is a negative. It says
23 there can't be prohibitions or effective prohibitions.
24 There's no directive to the FCC to set up rules here,
25 and that is a distinction.

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1 Also, obviously, 251(d) expressly requires
2 the FCC to do a rulemaking proceeding, and, clearly,
3 there's nothing like that in 253. So, you know, I
4 think it's clever, but it doesn't actually hold water.

5 MS. MAGO: Do we have a direct response to
6 that?

7 MS. MARRERO: Yes. I would like to say
8 that the interpretation you're making is if C is
9 brought as a separate violation, then I think your
10 points are well taken. But if C is viewed as a safe
11 harbor, as many of the courts have seen, then it
12 relates back to A, and there is express authority,
13 indeed, for the Commission to preempt A. And I think
14 if you don't take that into account, I think the
15 Second Circuit in the White Plains case saw this very
16 well, that you create a procedural oddity whereby the
17 defense to the claim determines the jurisdiction where
18 the claim will be held. So I think that the
19 difference is whether or not C is brought as an
20 independent claim, where your points would hold up, or
21 whether it's brought as a safe harbor defense to A.

22 MS. MAGO: I think that puts directly into
23 focus the tension of just exactly what is the status
24 of the B and C exemptions. Are they safe harbors?
25 And Pam, I think you had a view on that. Do you want

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1 to comment here?

2 MS. BEERY: I do. You know, this forum, I
3 have to preface my comments by saying, is an
4 opportunity, a soapbox if you will, and so you're
5 getting the expected, usual commentary, and I hope
6 that in future opportunities, perhaps hosted by this
7 organization, we'll have an opportunity for more
8 constructive dialogue.

9 But that said, I think one thing that
10 hasn't been talked about, and folks' eyes are glazing
11 over hearing the lawyers quote statutes and so forth,
12 is the policy that we ought to be thinking about, and
13 the last panel today is going to talk about a going
14 forward approach. But I think there are three things
15 that are going on already that dictate against the FCC
16 taking jurisdiction.

17 First is the LSGAC is meeting currently
18 with the Industry Rights-of-Way Working Group, and we
19 are hashing out line-by-line, issue-by-issue right-of-
20 way management issues in great detail. A lot of folks
21 are putting a lot of energy into that. I think that
22 effort should not be overlooked or ignored. Secondly,
23 this forum is a good start and your 706 proceeding.
24 Certainly, it's an opportunity that you have and a
25 legally sufficient one, I think, rather than a formal

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1 rulemaking. And finally, I think we need to focus
2 back on what Lisa said, and that is that 253(a) uses
3 the word "prohibit" or had the effect of prohibiting a
4 service and, at least in the district court in Oregon,
5 the case I'm litigating, the court found that that
6 word meant something. It's a high burden. 253(a) is
7 the first step in the analysis, and I think we ought
8 to be mindful of that.

9 MS. MAGO: Chris, do you want to respond
10 to that? I think that that was one of your points,
11 too.

12 MR. MELCHER: Yes. I think there's a
13 couple of points. One is that I think the FCC got it
14 right in their amicus brief to the Second Circuit
15 that, obviously, if C is raised as a defense, it would
16 make no sense whatsoever to first make a declaration
17 that there's a violation of A and then refer C back
18 somewhere else. If the FCC has a claim or a petition
19 making an argument that there's a violation of A, then
20 I think the better view, of course, is that the FCC
21 also has the jurisdiction to determine whether or not
22 there's a safe harbor under C. I just want to throw
23 that out there.

24 As to Pam's point about other forums or
25 addressing this, I have to respectfully disagree. I

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1 think there's been, certainly, some dialogue with the
2 LSGAC, but, unfortunately, I don't think that's really
3 going anywhere. We've kind of been bogged down with
4 any agreement on whether or not there's even problems
5 with right-of-way, and I think the Chairman and the
6 commissioners have recognized of course there's been
7 problems. It's not a majority of the cities, it's a
8 minority, but there have been problems. And so
9 everyone has recognized that. NARUC's recognized
10 that, the courts have recognized that. What do we do
11 about those problems? And that's really where this
12 jurisdiction is so important. What do we do about the
13 problems, and where do we go to try to find solution
14 for the problems?

15 I think it's clear that federal courts
16 have jurisdiction, obviously, and that they have been
17 resolving some of these disputes, but there, as well
18 all know, something of an imperfect forum because it
19 takes so long. Litigation is a very drawn out
20 process. It's time-consuming, it drains money, it
21 really is not the best way to resolve this for an
22 industry or for municipalities.

23 We have litigated, and Pam mentioned the
24 magistrate's decision in Portland, which really is
25 quite remarkable, I won't digress, but clearly will be

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1 reversed. The magistrate tells the Ninth Circuit that
2 they're wrong, which I haven't quite seen before. It
3 makes an easy appeal brief. But the Second Circuit
4 approvingly cited the Ninth Circuit in Auburn. I
5 think Auburn and White Plains will become the
6 standards on those issues. But we've been in Portland
7 for I don't know how long now in court, and we'll be
8 going to the court of appeals and then we'll go back
9 down. Look at White Plains. AT&T or TCG started in
10 '92, and the court recognized in '97, you know, the
11 ball really got rolling, and here we are five years
12 later with no resolution.

13 So yes, the courts have jurisdiction, but
14 the FCC has concurrent jurisdiction, and it's vital
15 for the FCC to step in, use that concurrent
16 jurisdiction, and try to lead on this issue. And I
17 would suggest that the ways to lead would be through a
18 policy statement or through some of the ongoing
19 proceedings, but Chairman Powell's comments, some of
20 the commissioner comments in different forums around
21 the country have been extremely helpful. The court
22 has noted that.

23 I think there is a national consensus that
24 right-of-way disputes have to be resolved. We have to
25 move on. We can't let folks go out of business, like

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1 Velocita and others, go bankrupt due to right-of-way
2 disputes, and we can't see the broadband deployment
3 slow down because, obviously, the industry and the
4 economy are desperate to see it advance.

5 So, jurisdictionally, where does that
6 leave us? It leaves us with the FCC with a leadership
7 opportunity, and I think, with a policy statement,
8 that would be extremely useful. I have comments,
9 obviously, on what that policy statement should say:
10 eliminate third-tier regulation, set up a fair
11 standard on compensation, and a few other issues; but
12 that's for other panels.

13 MS. MAGO: Teresa?

14 MS. MARRERO: I think the courts would
15 welcome the Commission's views on some of the issues
16 that have not been addressed. They have consistently
17 given deference to the Commission's free works set up
18 in the Troy decision and in classic, and the Second
19 Circuit specifically requested a supplemental brief.
20 So I think that, you know, the courts are looking to
21 you to, you know, give them some guidance on some of
22 the issues that Chris has mentioned.

23 MS. BEERY: I'd just like to follow-up, if
24 I could, Jane, on the White Plains issue. I think
25 that the Second Circuit decision, I would agree with

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1 Chris, represents a very thoughtful analysis and was
2 informed, as you point out, Teresa, by the
3 supplemental briefing from the FCC. But I think it's
4 important to note that the court drew together the
5 competing interests in its opinion and determined that
6 the FCC should be granted deference in its
7 interpretations. There's no question there. The
8 court did not conclude that the FCC's decisions are
9 controlling, and the court did not seek further FCC
10 formal proceedings. I think the court understood
11 clearly what your position was. And certainly, the
12 other important thing about White Plains, which I know
13 will be talked about in the next sessions, is what it
14 did or didn't do on compensation, which I think will
15 be a very interesting discussion.

16 MS. GELB: One thing I wanted to say about
17 the 253(a)(c) issue is White Plains was right.
18 There's something weird about the statute. I mean, it
19 doesn't make sense. I don't think that they
20 necessarily got the correct decision, you know, once
21 they went through the analysis, but there's no good
22 answer.

23 I mean, one answer is what Chris is
24 saying, which is, if it's before the FCC, if somebody
25 brings a 253(a) action to the FCC, the FCC has

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1 jurisdiction. It doesn't then have to throw it away
2 or give it up as soon as somebody raises a 253(c)
3 counterclaim. But if you take that approach, then
4 you're really not giving any deference or meaning to
5 the fact that Congress did eliminate subsection 253(c)
6 in any references in Section 253(d), and what the FCC
7 and the courts and everybody involved is being asked
8 to do is which is the less of two strange results.
9 One is it's a strange jurisdictional thing to say FCC,
10 you get part of this, but if anybody raises the most
11 obvious defense, you no longer have jurisdiction. But
12 that's probably a better and less offensive answer
13 than saying we're just going to read out the fact that
14 Congress has A and B written in D and specifically
15 took out any reference to C with FCC preemption. So
16 there's no good solution; it's a question of which is
17 the best solution.

18 MS. MAGO: Let me respond and ask you a
19 question on that, Lisa, because I think what you're
20 saying is that if the Commission has a case brought to
21 it under the 253(a) saying that there can be no local
22 statutes or no ordinances that create barriers to
23 entry and a defense is raised that this is a right-of-
24 way issue, that raises the issue that, I think, came
25 up here a little bit about do we have to simply say,

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1 okay, that's it, that's the end, don't think about
2 this anymore, or does the Commission have a basis for
3 trying to determine whether this is, in fact, a bona
4 fide issue, as we were looking at in the classic case,
5 for example, where the Commission contended that there
6 was merely a general assertion of the right-of-way
7 issue and how do we go about determining that? Can
8 you address that for a moment?

9 MS. GELB: I think then the FCC does lose
10 jurisdiction at that point, and I recognize that's an
11 extremely strange position to be in. I mean, Chris is
12 laughing, but I don't think it's any less strange to
13 say, well, we have extremely strong legislative
14 history from Congress saying whether or not something
15 is a legitimate right-of-way management tool is not
16 for the FCC to review and to read that out of the
17 statute, as well. So yes, I think it goes away from
18 the FCC and it goes to a court.

19 MS. MAGO: Chris?

20 MR. MELCHER: Well, I have to laugh, I
21 think we all have to laugh because Lisa's right. It's
22 a conundrum, it's a dilemma, but I think this happens,
23 I wouldn't say routinely, but it certainly happens in
24 our legal system, and it happens more often than we'd
25 like to admit that the statute is drawn inartfully.

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1 So it is left to us, the courts, and to folks affected
2 by the statutes to try to figure out what was the
3 intent of Congress, whatever that means, because
4 Congress, obviously, is a large body and changes year
5 to year or every two years. But what was intended and
6 what makes sense and what is consistent with our legal
7 precedent. I think the Second Circuit got it right,
8 and this applies for the FCC, as well. If you have a
9 violation stated of Section 253(a), logically, you
10 must go to any safe harbor to determine whether or not
11 the harbor invalidates the preemption or invalidates
12 the violation, so it's logically, I guess,
13 incomprehensible to me that you could have one body
14 determine that there's a violation of A and, yet, not
15 let that same body determine that a defense to the
16 violation applies or does not apply.

17 I think the second reason why it just
18 doesn't make sense to have one form for A and one form
19 for C is that of course, you raise the well-pleaded
20 defense rule, where a defendant gets to determine the
21 forum through their pleadings, and that's what the
22 Second Circuit recognized. If the defendant pleads a
23 safe harbor under C, then the defendant gets to yank
24 the dispute out of one forum and bring it to another.

25 I don't think anyone wants to see that, and the

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1 Second Circuit recognized that's not appropriate.

2 I think the FCC got it right in the amicus
3 brief. The courts have seen that. Whatever form it's
4 in, when an A violation is brought, that form needs to
5 determine both A and C, and I think that just makes
6 sense, that judicial economy, FCC economy, for all
7 those reasons.

8 MS. GELB: I just wanted to say something
9 quickly, which is it's weird but it's not
10 unprecedented, which is if somebody brought a state
11 and federal claim to a federal court, and the federal
12 claims got dismissed or, in some way, removed, the
13 federal court would not retain jurisdiction. I mean,
14 this isn't an unprecedented event, it's just a
15 different form.

16 MR. MELCHER: They actually might retain
17 jurisdiction if they determine the judicial economy
18 and fairness to the parties mandated that they keep
19 it. There is a doctrine that a federal court can,
20 after dismissing the federal claims that form the
21 basis for federal jurisdiction, retain the action and
22 determine the outcome.

23 MS. MAGO: Pam?

24 MS. BEERY: I would just like to add that,
25 you know, as I mention in my opening remarks, and I'd

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1 like to emphasize again that the system is not broken.

2 The matters are being litigated, the courts are being
3 informed by the FCC's guidelines and by your prior
4 interpretations, and in the case of White Plains, they
5 asked additional information from you. To create this
6 bifurcated approach is, I think, dangerous and is
7 going to lead only to more cost and more delay.
8 Again, I have to hearken back to the legislative
9 history and say that these arguments that the industry
10 is making now were made on the hill during the
11 adoption of the act, and they were not successful.

12 The way 253 is written is, you know, they
13 often quoted provision or the statement that I got
14 yesterday from Mr. Orton, Justice Scalia's comment
15 it's not a model of clarity. That's because it's a
16 compromise and subsection D was inserted; everybody
17 recognizes that, and, you know, as lawyers, we like to
18 tie things up in neat bundles and have nice clear
19 jurisdictional flow charts that we can follow. Well,
20 you know, this is an act of Congress, and I just think
21 we have to recognize that, and we have to move on. I
22 think the FCC has provided clear guidance.

23 And I really have to take issue with Mr.
24 Melcher's statement. I am on the LSGAC. Mr. Melcher
25 was not at our last meeting. We are making progress.

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1 I know that Mr. Fellman will address that at the end
2 of the day, but I just could not let that remark go
3 by. Sorry.

4 MS. MAGO: Chris, do you want to say
5 anything about this issue before I open the questions
6 up to the floor?

7 MS. MARRERO: Just one more point. If you
8 take the position that Lisa contends and Pam, if
9 you're just looking at the legislative history without
10 looking at the overall intent of the act and the
11 language in A, I think that that interpretation really
12 cuts against the broad prohibition set in A. The
13 Commission is cut out from looking at any safe harbor
14 under C, and I don't think that was the intent of A.

15 MS. MAGO: Thank you. Can I open the
16 questions up to the floor? It looks like maybe there
17 might be a couple here. Why don't we start there?
18 Please take the microphone and speak into that, so
19 that we can have the questions available to everybody.

20 MR. BRILL: My name is Robert Brill. I'm
21 an attorney from New York City. I have two general
22 questions or topics for you to expand on. One is that
23 the Second Circuit's opinion, in part, goes off on the
24 issue of the fact that they found that there was
25 disparity in treatment in the marketplace, that you

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1 had the incumbent, in effect, being treated more
2 favorably in their view under the statute than the
3 other competitive providers. So it seems to me, as a
4 bright-line matter for the FCC, shouldn't one of their
5 focuses be look at municipal statutes that do that and
6 say, as a guideline matter, if you're going to treat
7 one party grossly disparate from others, creating
8 competitive imbalances in the marketplace, that
9 regulation, as far as we're concerned, runs afoul of
10 the statute and is a preemptable, and that would send
11 a bright-line test that for every city in the
12 municipality that they better get their acts together.

13 By the way, they get more revenue, probably, that
14 way.

15 The second question has to do with delay
16 to the market. You had two commissioners today,
17 directly, Commissioner Abernathy; and then,
18 indirectly, Commissioner Copps, saying delay to the
19 marketplace, in effect, impinges on competition. I
20 think all providers know that. I'm sure Qwest
21 appreciates that. And it seems to me that if the goal
22 of the FCC is to aid competition, bright-line
23 guidelines saying to municipalities you may not erect
24 barriers in the processing of applications to get to
25 the marketplace in whatever fashion, whether it's in

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1 the statute, the rules, the RFP, the way you get a DOT
2 permit, a Department of Transportation permit, they
3 have to go by the board, if you are, in effect,
4 creating an imbalance in the marketplace. The
5 incumbent is there already; what about the
6 competitors? So could you comment on that?

7 MS. MAGO: Does somebody want to take that
8 one on?

9 MS. BEERY: Thank you, Mr. Brill. Those
10 are good questions. On the White Plains
11 discrimination case, you're absolutely right. It's
12 one of the classic bad-facts cases for local
13 government. It took seven years in that case, and TCG
14 was still not in the streets. It's not a good
15 situation.

16 Also, it's true in that case that the
17 incumbent was paying zero in terms of compensation for
18 the right-of-way, while the entrant, the new market
19 entrant, was going to be asked to pay a five-percent
20 based on gross revenue fee. That is probably one of
21 the farthest end of the spectrum situations that you
22 will find, and really, in reality, my contention in
23 having represented local governments for 22 years now
24 and dealt with a lot of these issues for a long time,
25 the bright line isn't there. As Commissioner Copps

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1 mentioned this morning, the devil is in the details.
2 There are all kinds of shades of gray, and so for the
3 FCC to, in a vacuum of facts, try to pronounce what
4 that line is, I think, would be impossible.

5 As far as delay to the market goes, I
6 would agree with you. None of us in the government
7 sector want to see delay to the market. It's in our
8 interest, as policymakers and representing our
9 constituents to get broadband deployment, no question
10 about it. I do think that the bad stories are the
11 few. Certainly, we welcome more dialogue on that.
12 Every time we've asked for details, we get a few
13 stories, and I don't know of much more than that.

14 I will say that in industry's comments to
15 the FCC recently, they have acknowledged that delay to
16 the market is only one factor in their problems with
17 deployment in their own testimony to the Chairman, and
18 recent articles from the industry reflect that, in
19 fact, 85 million miles of fiber have been installed
20 since 1980, two-thirds of those since the '96 Act was
21 passed, so I don't think we're having a delay getting
22 into the streets is our main problem in deployment.

23 MS. MAGO: Chris?

24 MR. MELCHER: Well, I would agree that the
25 TCG case did present as bad a set of facts as you

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1 could possibly get if you were a city. I would say
2 that bright line and delay really are two good
3 subjects to raise together in this because delay is a
4 significant problem, and, with all due respect to Pam,
5 the industry feels that it's one of the most serious
6 problems we've had.

7 Velocita, which is now no longer in
8 existence, directly attributed delay in deployment of
9 its facilities as a primary cause for its bankruptcy
10 and its demise and did so with NTI, and Nancy Victory,
11 a month or so ago, has done so in other filings with
12 the FCC, and every industry play, whether it's a CLEC,
13 an ILEC, or whoever, has stories about tremendous
14 delay, and those are lessening, I think, now because
15 the cities realize, first of all, that the delay was
16 deadly to a lot of the efforts.

17 Some cities, frankly, just didn't get
18 facilities due to the delay because the time was lost,
19 the window closed, the provider voluntarily or
20 involuntarily went away. But delay is still a major
21 problem, and I think the bright line aspect of that,
22 it could be solved fairly quickly. I think the
23 industry has suggested, and the FCC could act on this
24 to state as a policy or in some other way, that every
25 city should deal with franchise applications or deal

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1 with permits within a set period of time, say 60 days,
2 if the application is complete, and the industry
3 certainly understands if you submit an incomplete
4 application, the clock doesn't run, similar to other
5 proceedings, but if the LSGAC wants to take that up
6 and agree that delay is something that we need to
7 solve and work with us on that I'd love to see that;
8 I'd love to see the FCC act on that.

9 MS. MAGO: I think that we're all trying
10 to get to some solutions and maybe we can get there
11 from here. The one other thing is I'll take a little
12 bit of moderator's privilege and point out that the
13 Commission in the White Plains case that we've been
14 talking about did submit a brief to the court, where
15 we pointed out that it was the agency's position that
16 it's required to treat all of the entrants on the same
17 playing field, that you have to have neutral
18 regulations; you can't treat the incumbent differently
19 than the new entrants, and that's been the
20 Commission's position on this.

21 MS. GELB: Even in that decision, the
22 court recognized that there is different types of
23 compensation, and so the question really was why
24 doesn't the FCC come out and set rules saying here's
25 how to do it or here's what you can't do, and I think,

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1 actually, if you read that decision, it's not clear, I
2 mean, it's pretty clear from the decision that's not
3 an easy or necessarily appropriate thing for the FCC
4 to do because the court did recognize, look, there are
5 different ways of getting compensation, and it doesn't
6 mean that everybody has to pay dollar-for-dollar. You
7 can factor the compensation in different ways without
8 it being discriminatory or unfair, and that's a
9 difficult thing to set a bright-line rule for.

10 Ms. MAGO: And I think we're going to be
11 talking about the compensation issues on the panel
12 later today. Can I get another question from the
13 audience?

14 MR. CHERNOW: Thank you. Bob Chernow from
15 the RTC in Wisconsin. Maybe this is very obvious, but
16 really what you're talking about is regulations on
17 telecommunication companies, not on cable companies.
18 Cable companies don't have problems with right-of-
19 ways. They go through a different system, and as
20 unethical as many of them are, this is not one of the
21 problems that they have. This is not one of the
22 difficulties that they have. They go through cleanly,
23 they cooperate with us, they put their stuff in, and
24 I'm saying this as a financial advisor, someone who
25 controls about \$300 million, they probably have won

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1 the broadband battle. So what we're doing is talking
2 here about, from our point of view as municipalities,
3 bringing competition. The telecommunication companies
4 are talking about rights-of-way instead of sitting
5 down and cooperating with local communities to get the
6 job done. Why does one system work, and the other one
7 doesn't? Perhaps, you can address that? Thank you.

8 MR. MELCHER: Actually, I'd love to
9 address that. I'm glad you raised that because that
10 has been a common assertion or question, really, why
11 one works and why one doesn't. It's actually pretty
12 simple; one's cable and one's telecom. And what I
13 mean by that is cable made a deal, cable made a
14 bargain back in '92 or the various time periods when
15 the act was amended, and the bargain was we'll pay
16 five-percent of gross receipts, and in exchange for
17 five-percent of gross receipts we'll get a local
18 monopoly with, you know, the ability for entrants to
19 come in. But, in effect, there really is no
20 competition in the cable industry; we can see that.
21 So really, you have a local monopoly that agrees to
22 pay five-percent, has sort of unfettered ability to
23 pass that five-percent on to its customers, so it's a
24 pure pass-through, and, in exchange, gets the permits.
25 I think it's actually interesting to see how easily

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1 permits can be issued and how quickly they can be
2 issued when the five-percent is paid, and a lot of the
3 delay has been over negotiations on, unfortunately,
4 dollars. It's really come down to telecom companies
5 are being asked to pay five-percent of gross receipts.

6 They're being asked to pay linear foot charges.
7 They're being asked to pay for this access to the
8 right-of-way, and that's really been the focus of the
9 delay, unfortunately. Cable companies don't have to
10 negotiate. It's already been said, it's already been
11 bargained, they pass it through. They don't have the
12 competitive pressures that telecom companies do of
13 those kind of charges, so that really is the root of
14 it. We'd love to see this move more quickly.

15 MS. MAGO: I don't think Pam's going to
16 let us get away with that.

17 MS. BEERY: No, I won't. Chris, you
18 probably haven't negotiated a cable franchise lately.

19 It takes a long time; it's very difficult, and the
20 cable industry probably would beg to differ with you
21 on many of the assertions you made. The one couple
22 that I can't let go by are that, in fact, we are
23 prohibited from granting exclusive franchise by law,
24 and so they don't exist. Every franchise granted is
25 non-exclusive. And certainly, the cable industry has

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1 had to litigate a lot of issues related to what is a
2 pass-through and what isn't. We all do function in
3 that highly-regulated environment, but I would
4 question highly, I'll just leave it at that, your
5 assertion that cable made a deal for five-percent
6 because it is highly regulated, and I'll just leave it
7 at that.

8 MR. MELCHER: Actually, I do represent
9 Qwest on our cable business, so I'm a competitive
10 cable provider, that I know exactly how much
11 competition there is or isn't, unfortunately, from
12 firsthand experience.

13 MS. MAGO: Okay. We'll take another
14 question from over there.

15 MR. SILVERMAN: Rick Silverman from the
16 National Cable and Telecommunications Association.
17 Well, first, I wanted to respond to, well, take
18 umbrage at the comment that cable companies are
19 somehow unethical and, yet, you yourself admitted
20 that, in dealing with rights-of-way issues, everything
21 works very smoothly, so I'm not sure why the cheap
22 shot here today. But I've worked with Qwest quite a
23 bit and agree with him on many things. I do disagree
24 on the competition side because we face lots of
25 competition from the DBS providers, and it's an

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1 analogous situation where we are paying, typically
2 five-percent, and don't have any problems with that on
3 the cable side, although, as Pam mentioned, there are
4 some cases about either pass-through or, you know,
5 what's in the gross revenue. But the DBS guys,
6 generally, do not pay a similar fee, so there is a
7 competitive disparity, just as you're raising. And as
8 the most recent video competition report found, DBS is
9 now almost 25% of the multi-channelled video markets.
10 So we do have competition, there is a disparity in
11 terms of the fees paid, and so it's sort of an
12 analogous situation, but I hope we can refrain from
13 the cheap shots at cable for the rest of the day.

14 MS. MAGO: On that, let me, let's see,
15 Ken, did you want to ask one more question and then
16 we'll have to wrap up because we're running out of
17 time here.

18 MR. FELLMAN: Thank you, Jane. Ken
19 Fellman, I'm the mayor of Arvada, Colorado and the
20 chair of the Local and State Government Advisory
21 Committee. This isn't a question. I just wanted to
22 set the record straight on an issue. The entire panel
23 spoke, and I was only shocked at one comment.

24 MS. MAGO: Was it mine?

25 MR. FELLMAN: No, it wasn't yours. Chris

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1 knows. Chris made a comment that the discussions
2 between the Local and State Government Advisory
3 Committee and the Industry Rights-of-Way Working Group
4 are not going anywhere. I just want to point out for
5 those who are interested in this process while his
6 company is represented in the working group, he has
7 not been present at the meetings. There are people
8 here today who have been present at the meetings. I
9 hope that off-line, if they really think that the
10 process isn't going anywhere, they will tell me so we
11 can stop wasting their time and our time and the
12 Commission's staff time for coming to those meetings.

13 And the one other thing he said about that
14 process that was inaccurate is that the local
15 government position is that there is no problem.
16 That's not true. The local government's position has
17 been before we talk about a broad national preemptive
18 solution, we need to define the problem, and what we
19 see as a process problem is that the industry, at
20 times, comes to this agency and says we need a federal
21 rule of preemption before we take the necessary time
22 to define the problem. That's really the issue that
23 we've been discussing. These are not easy issues, and
24 I think the discussions have been productive, and I do
25 think they're going somewhere positive. We'll talk

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1 about that in a later panel, but I wanted to set the
2 record straight on what those discussions have been.

3 MS. MAGO: Thank you. I want to take the
4 opportunity to thank all of the panelists for coming
5 today and for addressing this important topic with us.

6 I think one of the things that we have tried to bring
7 out of all of this is to get an airing of the
8 different views and, hopefully, facilitate some
9 opportunity for some dialogue off-line, which I think
10 is precisely what we should be having in talking with
11 each other, which is the purpose of the forum that we
12 have today. It's not just to hear the views of the
13 panelists and get the chance for formal interchange
14 but also to have a little bit of informal interchange,
15 so that we can all be working towards what are the
16 best possible solutions for dealing with what we call
17 recognize is something of a bit of a thorny issue that
18 we have to try to address.

19 So with that, I will say does anybody want
20 to make a final comment on the panel today? Hearing
21 none. Oops, Chris?

22 MR. MELCHER: I just want to say thank you
23 again for all your work and your effort and thank the
24 FCC and the commissioners for allowing us to be here.

25 MS. MAGO: Thank you very much. And thank

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1 you to all of you.

2 MR. SNOWDEN: We're going to take a 15-
3 minute break. We'll resume back at 11:15.

4 (Whereupon, the foregoing matter went off
5 the record at 10:56 a.m. and went back on
6 the record at 11:15 a.m.)

7 MR. SNOWDEN: I think we're going to go
8 ahead and get started. The joke earlier was that the
9 lawyers were going to start everything off, and I
10 think they set a good tone for keeping us on schedule,
11 so as we go through the next set of panels, that will
12 be our goal moving forward.

13 It is my pleasure to bring to the podium
14 Mr. Bill Maher, who's new to the Commission but not
15 new to this industry or new to these issues. Bill is
16 the Chief of the Wireline Competition Bureau and, on
17 this particular panel, will be talking about
18 compensation in the area of rights-of-ways. Please
19 welcome Mr. Bill Maher.

20 MR. MAHER: Thanks very much, Dane. I'm
21 happy to welcome all of you to this morning's second
22 panel. Our panel will discuss fair and reasonable
23 compensation for the use of the public right-of-ways
24 and, of course, that's key language in Section 253(c).
25 In particular, I think this panel will cover a broad

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1 ray of topics having to do with compensation,
2 including, for example, the relationship between
3 compensation issues and competition in local
4 telecommunications markets.

5 We'll also discuss whether it's
6 appropriate for governments and parties to consider
7 the history of services that have been provided to a
8 locality by incumbents when they're considering
9 compensation issues. And the panel will also look at
10 under what circumstances, if any, fair and reasonable
11 compensation may include such types of fees as
12 revenue-based fees and, in kind, compensation. We'll
13 discuss how compensation should be related or could be
14 related to actual costs and how do you define those
15 costs? And I also will be seeking input from the
16 panel, we heard it earlier this morning, on best
17 practices that parties and governments can use in
18 discussing and agreeing upon compensation for use of
19 the public rights-of-way.

20 And with that, I think we'll star the
21 presentations. Our first speaker is Sandy Sakamoto,
22 who is a general attorney and an assistant general
23 counsel who manages the Los Angeles Legal Department
24 for SBC. Her practice focuses on litigation, general
25 business matters, network operations, and issues

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1 dealing with rights-of-way. She began her career with
2 Pacific Telephone in 1976 working in network
3 administration and worked onto the legal field. She
4 has been a presenter on right-of-way case law updates
5 at Law Seminars International presentations and is an
6 expert in the field. Sandy?

7 MS. SAKAMOTO: Thank you very much, Bill,
8 and thank you to the Chairman and the commissioners
9 again for allowing the opportunity to speak today and
10 at least start the dialogue, as was mentioned earlier,
11 about this very important issue. We have the
12 unenviable task here on the panel to talk about a very
13 provocative area in this whole right-of-way management
14 subject, and I'm sure that many of the comments that I
15 make and, perhaps, comments made by other panelists
16 will evoke some level of emotion because I think we
17 have some very differing points of view, and so I'm
18 not sure that we will achieve a necessarily short-term
19 compromise on these issues but, perhaps, it will
20 elicit a way to think creatively, as was mentioned
21 earlier by the commissioners, about how to resolve,
22 perhaps how to reach a compromise on some of these
23 issues that sort of keep us apart in terms of working
24 together.

25 I do have a fair amount of ground to

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1 cover, and so I'm going to motor through some prepared
2 remarks. As we've heard, Section 253 of the federal
3 act was designed to eliminate barriers to entry that
4 might be erected by state and local governments. The
5 charter of the act was the promotion of robust
6 competition, and, in recognition of such, Congress
7 wanted to ensure that local governments would not
8 create unnecessary obstacles that would effectively
9 limit or, in severe cases, prohibit competition in the
10 deployment of new technologies.

11 At the core of the current debate over
12 access to rights-of-ways is subsection C of that
13 statute, as you've heard, and on the slide, we have
14 what it says, in fact, and it's very simple. It says
15 that nothing in the section affects the authority of a
16 state or local government to manage the public rights-
17 of-way or to require fair and reasonable compensation
18 from telecom providers on a competitively and
19 nondiscriminatory basis for use of public rights-of-
20 way on a nondiscriminatory basis, if the compensation
21 is publicly disclosed. Some local governments have
22 reveled in the notion that this provision is a new
23 grant of authority, something more expansive to charge
24 compensation in excess of what existing, more
25 restrictive state laws allow. This pre-emptive theory

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1 is fundamentally betrayed by the very language of
2 subsection C, lacking in any expression of granting
3 authority. And while some have viewed subsection C as
4 a savings clause or a safe harbor for states and local
5 governments, if the outer limits of this subsection
6 provide for the creation of regulation and fees that
7 go beyond the economic realities of what some or most
8 telecom providers may reasonable withstand, Congress
9 has done nothing more than giveth and taketh away,
10 creating no clear path for spurring on the rapid
11 deployment of telecommunications. Certainly, that was
12 not the intent of Congress.

13 So what does subsection C really mean?
14 253(c) was Congress' way of recognizing local
15 governments' traditional existing police power
16 authority to manage the rights-of-way. Local
17 governments were concerned that the sweeping
18 prohibitive language of 253(a) might preempt their
19 authority over the health, safety, and welfare of
20 right-of-way management. Careful not to preempt the
21 status quo, the drafters of 253(c) did not include
22 granting language that would enlarge the existing
23 police power authority held by local governments.
24 They did, however, include language that describes the
25 outer most scope of state and local government

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1 control; that is to manage the public rights-of-way to
2 require fair and reasonable compensation on a
3 competitively and nondiscriminatory basis for use of
4 public rights-of-way if publicly disclosed, as the
5 section says.

6 What did Congress mean by fair and
7 reasonable compensation? We believe, in the industry,
8 that it means fees directly related to local
9 government's actual and incremental cost to manage
10 public rights-of-way and for the provider's use of
11 that right-of-way. Compensation means restitution for
12 losses or damages or to restore one to its prior
13 economic position. This entitles a local government
14 to recoup its actual and incremental costs to manage
15 the right-of-way but not to profit from it.

16 Furthermore, compensation under 253(c)
17 must be for the actual use of the right-of-way and may
18 not, therefore, be accessed in unrelated grounds. For
19 the numerous legal and policy reasons, fees based upon
20 gross revenues, construction costs, per linear foot,
21 or in kind services or facilities are not permitted
22 forms of compensation contemplated under 253(c). Fees
23 based upon gross revenues is nothing less than a tax
24 upon the revenue stream of the provider or its
25 business operations, bearing no relationship

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1 whatsoever with the management or use of the right-of-
2 way, as this Commission recognized in its amicus brief
3 filed in the White Plains appeal. It is a regulation
4 on the business and has more, frankly, to do with the
5 ability of the provider to market its services than it
6 does with any physical use of the streets or roads.

7 Fees based on a percent of gross costs or
8 construction costs also bear no relationship to the
9 management or use of the right-of-way. How much it
10 costs a provider to build out a network is no measure
11 of how much a city has or will incur to manage it.

12 Fees charged on a per linear-foot basis might appear
13 to be related to use of the right-of-way, but if that
14 is so, municipalities should be able to demonstrate
15 that, for each additional linear foot of construction,
16 the city incurs a set incremental cost. Frankly, I've
17 never seen that sort of cost study documented, and it
18 does seem somewhat doubtful that a city would incur,
19 for example, 500 times the cost to review a permit
20 application, review construction plans or traffic
21 management plans, and do inspections on a 5,000-foot
22 construction project as it would for a 10-foot
23 construction project. More telling is experience,
24 unfortunately, to the opposite. What the industry has
25 seen in some cases is local government imposing

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1 arbitrary per linear-foot fees, oftentimes premised on
2 what the last provider was willing to pay and
3 negotiate for and, admittedly, not based on any real
4 study of data or costs.

5 In kind, exactions, whose economic value
6 may vary enormously depending on factors, such as
7 connectivity to other facilities, the ability of the
8 city to operate or use those facilities, or whether
9 the facilities will be used to lease to others also
10 have no relationship to the provider's use of the
11 right-of-way or the city's cost to manage access.
12 Accordingly, in kind exactions are arbitrary and
13 cannot be effectively imposed on a competitively
14 neutral and nondiscriminatory basis. Moreover,
15 dedicating facilities to municipality may be, in fact,
16 benefiting a municipally-owned competitor.

17 What about fees upon fair market rents or
18 value? After all, municipalities have argued long and
19 hard that they should be entitled to the full value of
20 the scarce property asset that they have paid to
21 acquire and maintain. The fallacies in this model
22 abound.

23 First of all, using tax dollars, state and
24 local governments acquire and maintain public rights-
25 of-way in trust for the public's use. More often than

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1 not, streets are simply dedicated to the local
2 government at no charge for the public's use as a
3 condition of approval for private development.
4 Regardless of the method by which a local government
5 may acquire or hold title over a street or a road, the
6 role played by the governmental entity is governmental
7 in nature.

8 Managing the right-of-way is not a
9 commercial endeavor, nor is it a proprietary function.

10 The fair market value model has no place in this
11 context. Fair market value is a model for valuation
12 of privately-held property, which fluctuates with
13 market demand and only works when there are free
14 market forces between a willing seller and a willing
15 buyer at play. If a commodity is a public right-of-
16 way, there are at least two essential missing
17 elements: number one, a free market; and number two,
18 demand from similarly-situated buyers. There is no
19 free market forces at work when the local governments
20 are the monopolists standing as guardians over public
21 rights-of-way, which are the only cost effective way
22 for telecommunication providers to deliver their
23 services to the public. In this scenario, without
24 limitations, the monopolists would be free to set fees
25 at the highest price a provider is willing to pay,

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1 and, in fact, we've seen this. Those fees,
2 unfortunately, have sometimes become the default floor
3 for the charge of fees to all other subsequent
4 providers.

5 In regards to public rights-of-way, the
6 so-called buyers consist of a number of users, the
7 traveling public, the municipality itself, public
8 utilities, and other public service providers are
9 operating under separate and distinct laws and
10 regulatory regimes. For example, the traveling public
11 and, generally, the municipality are not locally
12 regulated and do not pay fees. And users, such as
13 cable television, gas, and electric companies
14 developed community-based systems, and local
15 governments are granted authority, through the Cable
16 Act and other state laws, to franchise their
17 operations, including access to rights-of-way. Such
18 regulatory schemes are inherently different than the
19 state and federal regulation of telecommunication
20 companies.

21 The delivery of telecommunication services
22 is a public benefit use and compatible with other
23 public uses of the rights-of-way. Compensation for a
24 compatible co-existing public use is in the nature of
25 the incremental loss or cost to that entity. There is

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1 no true market, in the truest sense, or rental rate
2 for an asset dedicated for the public use.

3 MR. MAHER: Sandy, it's about time to wrap
4 up.

5 MS. SAKAMOTO: Okay. I do want to say
6 that we believe that the proper model under 253(c)
7 must be based on incremental costs to make the
8 criteria fair and reasonable, and there are a number
9 of reasons why we believe that that's fair, why it is
10 competitively neutral and nondiscriminatory, and why
11 it is reasonable, given the national priority given to
12 telecommunications deployment and the rapid
13 advancement of technologies. And I think that it's
14 very important that that's the common ground that we
15 talk about and talk from in order to come up with
16 creative and/or compromised solutions to an issue I
17 know that we don't all see eye-to-eye on.

18 MR. MAHER: Our next speaker is Don
19 Knight, who's with the City Attorney's Office in
20 Dallas, Texas. He advises and represents city counsel
21 and city officials on a variety of legal matters,
22 including telecommunications, cable, electric and gas
23 utility regulation, technology acquisitions, and
24 electric supply agreements. He has a number of major
25 projects that include cable cases, 911 agreements, PUC

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1 rulemakings, and rights-of-way proceedings. Mr.
2 Knight has a long experience in the field. He was
3 also with the city attorney's office of Irving, Texas.

4 So welcome.

5 MR. KNIGHT: Thank you, Bill. As Bill
6 said, I am an assistant city attorney with the city of
7 Dallas. I also serve as chair of the Texas Coalition
8 of Cities for Utility Issues. It's an organization
9 that includes 110 Texas cities of all sizes. Before I
10 offer my testimony, though, I would like to thank the
11 FCC for your invitation to speak today and, also, your
12 willingness to consider local governments perspective,
13 as demonstrated by the make-up of the various panels.

14
15 While I represent the city of Dallas as an
16 assistant city attorney, the opinions that I share
17 with you today are my own, based on nearly 20 years of
18 experience in local government. Also, if you find
19 yourself wanting to laugh at any of my remarks, go
20 ahead. Some of this is supposed to be humorous. I
21 have to admit right away compensation humor is an
22 oxymoron if I've ever heard one.

23 Okay. So how do I tell the FCC everything
24 you need to know about fair and reasonable
25 compensation in five to seven minutes? I started off

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1 by putting together some examples of myths that float
2 around this issue and the corresponding realities.

3 Myth number one: courts have long held
4 right-of-way fees must be cost-based. The reality is
5 this position confuses regulatory fees with fees for
6 use of public property or rent. Regulatory fees, such
7 as fees for inspections, say a building permit fee,
8 should be based on the cost of regulating. However,
9 fees for rental of public property should be based on
10 the value of the property being rented.

11 Myth number two: reductions in right-of-
12 way fees will curb wasteful local government spending.

13 The reality is local budgets are already so lean, if
14 they turned sideways, they'd disappear. That was one
15 of the humorous parts.

16 Myth number three: right-of-way fees are
17 really hidden taxes. The reality: right-of-way fees
18 are rental for the use of public property. They are
19 no more hidden taxes than the fee that is charged to
20 rent a publicly-owned auditorium for a musical
21 concert. Just like telecoms, the concert promoter
22 recovers his cost of renting the facility in the price
23 of the ticket. The only different is the concert
24 promoter doesn't line-item concert hall rental fee on
25 the receipt for your ticket, like the phone company

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1 does on your phone bill where it says municipal fee or
2 right-of-way fee.

3 Myth number four: local governments make
4 money on right-of-way fees. The reality is, in most
5 communities, the amount collected in right-of-way fees
6 is less than what they spend on an annual basis on
7 building and maintaining the right-of-way and related
8 infrastructure.

9 Myth number five: fair and reasonable
10 compensation means cost-based fees. Well, the reality
11 is I'd be happy to put everyone believes that to work
12 for me. Of course, I will pay you fair and reasonable
13 compensation, which will only include your out-of-
14 pocket expenses, like the gas it costs you to get to
15 work and your dry-cleaning bill, because if I paid you
16 for the value of your work, I'd be letting you take
17 unfair advantage of me.

18 Myth number six: reducing right-of-way
19 fees will cause telecoms to be profitable and stop the
20 current wave of bankruptcies. The reality is right-
21 of-way fees are a small percentage of the companies'
22 total revenues and are passed through to customers
23 and, therefore, do not affect the companies' bottom
24 line. For one to totally eliminate right-of-way fees,
25 it would not change the fact that the industry

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1 currently suffers from a massive over-supply of
2 capacity. It's like suggesting that enough duct tape
3 in the right places could have kept the Titanic from
4 sinking.

5 All right. Myth number seven: Free or at-
6 cost use of the right-of-way will promote faster
7 deployment of advanced services. In the state of
8 Texas, DSL service pays no right-of-way fee. During
9 the entire broadband deployment, up until March of
10 this year, cable modem service paid right-of-way fees;
11 DSL did not. Despite this, in Texas, as in the rest
12 of the country, cable modem services have had a much
13 higher rate of deployment than DSL. The reason for
14 this is that cities have required, as a condition of
15 cable franchise renewal, that cable companies upgrade
16 their cable system. This upgrade is what allows cable
17 modem service to be provided. And unlike DSL service,
18 cable companies are required to provide this upgraded
19 system to every household. That makes cable modem
20 service possible city-wide, once the upgrade is
21 completed.

22 Myth number eight: recent state
23 legislation, such as House Bill 1777 in Texas, has
24 resulted in more uniform compensation schemes and
25 administrative simplicity for companies and cities.

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1 The reality is, in Texas, many telecoms, some small,
2 some large, have shown an unwillingness or an
3 inability to comply with House Bill 1777. The staff
4 at the Texas Public Utility Commission recently
5 reported numbers to the Commission that suggest less
6 than half of the 400 or so telecoms certificated in
7 the state were complying with all the requirements of
8 the Act. Staff at the PUC, already working under a
9 heavy workload, now have new enforcement and
10 information-gathering responsibility. Cities, on the
11 other hand, are regularly receiving incorrect
12 compensation reports but, to date, have been unable to
13 audit any of them.

14 Now, for today's final myth: the FCC is a
15 better choice to deal with local right-of-way issues
16 because they are a lot smarter than the people in the
17 35,000 communities across this country that do it now.

18 The reality: FCC staffers have refused to submit to
19 IQ tests until the commissioners and the mayors take
20 them first, so the jury is out on whether that's a
21 myth or reality.

22 So after running through a number of these
23 myths, I realize that what seemed like a daunting task
24 was actually quite simple. All the Commission really
25 needs to know is one thing: it's not your job.

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1 Section 253(d) specifically removes FCC jurisdiction
2 over issues of what is fair and reasonable
3 compensation. The industry's argument that the FCC
4 has jurisdiction over the question of what is fair and
5 reasonable compensation if it constitutes a barrier to
6 entry under section 253(a) is merely an attempt to re-
7 write the statute to say what it does not. The fact
8 is local government enjoys a safe harbor if the right-
9 of-way fee is fair and reasonable, and the
10 determination of fair and reasonable is reserved to
11 the federal courts. And you needn't worry, the
12 industry can find its way to federal court, as my city
13 can certainly attest.

14 So the local government may require fair
15 and reasonable compensation, even if it could be
16 argued its actions are barrier to entry. How do we
17 know this? Well, you only need read Section 253(c),
18 which says nothing in this section, referring to all
19 of Section 253, affects the authority of a state or
20 local government to manage the public right-of-ways or
21 require fair and reasonable compensation. Clearly,
22 nothing in this section means that Section A's barrier
23 to entry prescription could never limit the ability to
24 require reasonable compensation, which makes sense if
25 you think about it. How could anyone argue that

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1 reasonable compensation is a barrier to entry?

2 Jurisdictional issues aside, and I'll wrap
3 up here, I think a more fundamental question for the
4 FCC is why the heck would you want to get in the
5 middle of this? Why insert yourself into an issue
6 that you have no expertise in or authority to resolve,
7 when there are so many issues out there on your plate
8 right now that do fall within the Commission's
9 expertise and authority? So in light of this, what
10 should the FCC be doing when they hear complaints from
11 the industry about right-of-way fees? Personally, I
12 think it's reasonable to suggest that the answer to
13 that question is nothing. It is literally none of
14 your business, and, believe me, I tried to think of a
15 nicer way to say that, but it just didn't ring true.
16 Congress has not given the FCC authority to act on
17 this issue. In fact, the legislative history of the
18 Act indicates just the opposite. Republican
19 Congressman Joe Barton, co-author of the Barton-Stupak
20 Amendment that added 253(c) language that became law
21 in the House Bill, made the following statement during
22 the Florida debate, where his amendment passed
23 overwhelmingly, 338 to 86. Congressman Barton said,
24 The amendment explicitly guarantees that cities and
25 local governments have the right, not only to control

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1 access within their city limits, but also to set the
2 compensation level for the use of right-of-way. The
3 federal government has no business telling state and
4 local government how to price access to their local
5 right-of-way.

6 Now, I realize that it's possible that the
7 FCC, despite all this sees a role as one of
8 establishing dialogue between cities and the industry.

9 And if that's the case, then I have a simple,
10 straightforward plan that imposes little or no
11 additional workload on the FCC, which, with your
12 current workload, should be good news. What the FCC
13 must do is to get to a meaningful dialogue by sending
14 the following message to the industry loudly and
15 clearly: we, the FCC, have no authority over right-of-
16 way compensation and management issues. Do not come
17 crying to us. Go to the local government or other
18 organizations and explain the problem to them. Work
19 out a solution you can both agree to. If this fails,
20 you still have the courts as a last resort. As long
21 as the industry thinks that it has a chance of getting
22 the FCC to impose their preferred solution on local
23 governments, they will have no motivation to settle
24 for anything else, and meaningful dialogue with local
25 government will not succeed.

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1 In closing, I want to remind everyone that
2 the natural result of competition is survival of those
3 best equipped to compete in the death, also known as
4 Chapter 7, of those who are not so well equipped.
5 This is the price of competition. However, the price
6 of competition in the telecommunications industry
7 should never include loss of local government
8 services. If the industry's well-orchestrated effort
9 to reduce right-of-way fees from their current levels
10 is successful, a loss of local government services
11 will be the inevitable result. Thank you.

12 MR. MAHER: Thanks, Don. Our next
13 panelist is Kelsi Reeves. She's Vice President,
14 Federal Government Relations, for Time Warner Telecom.
15 She was named to this position in January 2000, and
16 she is responsible for all matters, including rights-
17 of-way issues, affecting Time Warner Telecom in the
18 federal regulatory, legislative, and governmental
19 purviews. Kelsi?

20 MS. REEVES: Thank you. I really
21 appreciate the fact that the FCC is focusing on this.
22 I think there are questions about jurisdiction,
23 obviously, and what the FCC can do. Having worked in
24 and around this issue for the past 10 years, there is
25 no one simple, easy solution. The FCC isn't going to

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1 be able to come down and solve all these problems.
2 But I think it is very important that the FCC
3 recognize that it is a significant problem.

4 At Time Warner Telecom, what we do is we
5 go out and we build competitive telecommunications
6 networks. About 80% of the revenues that we earn
7 actually come over our own network. The other 20%, we
8 buy, mostly special access, from the incumbent local
9 exchange company and, essentially, re-sell services.
10 What happens are barriers to entry. We have a
11 different focus. I'm just so happy right now that
12 we're focusing on right-of-way. Maybe someday we'll
13 get to focus on building access. But for a
14 facilities-based company, the two big barriers to
15 competition are access to the right-of-way, access to
16 buildings, and then I say we have three: access,
17 access, access issues. The third one is being able to
18 get special access when we can't go out and build our
19 own facilities. So access, if you really want to see
20 facilities-based competition, access to the right-of-
21 way is critical. There is just no way of getting
22 around the fact that these issues have to be solved.

23 I did an informal survey. We offer
24 service in 44 MSA's in 21 states across the nation,
25 and I did an informal survey of all of the general

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1 managers that operate in the different cities. In the
2 21 states that we operate in, I heard back from seven
3 of them that were having significant problems with
4 rights-of-way, so the other states are going okay.

5 But what you're going to see is, in the
6 states where we're not having problems with rights-of-
7 way, we're going to be deploying more facilities,
8 customers are going to have access to more diverse
9 services, and we really do offer diverse services. I
10 mean, a lot of the things that we're trying to do and
11 one of the reasons that we're somewhat successful in
12 today's marketplace is that we offer redundant
13 facilities. You have a lot of state and local
14 governments. We've got Air Force bases, airports,
15 hospitals, public schools that are coming to use
16 because they want alternative facilities into their
17 offices, so that if services goes down, like something
18 happens on 9/11, something like that happens, that
19 there are redundant facilities in there. And if you
20 want to put redundant facilities, if you want to have
21 true facilities-based competition, you have to have
22 access to the right-of-way.

23 Well, what we, at Time Warner Telecom,
24 focus on doing is building a long-term, viable plan.
25 I think it's interesting, when you talk about doing

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1 something like having a percentage of our revenues go
2 to the city for access to the right-of-way, it really
3 distorts, it distorts our business plan for a number
4 of different reasons. The first is we go out -□ I was
5 going to say something; I probably won't. Well,
6 anyway, if you were going to do based on, if we have
7 to put five-percent of our revenue, if we have to pass
8 that through to our customers, what happens quite
9 often is you'll get into a negotiation with a very
10 large contract, and since it's not required, we're not
11 in the cable arena where you have a five-percent that
12 everybody charges and everybody passes through. What
13 you have is just a patchwork of different regulation
14 and different applications. And so we can get into a
15 negotiation for a contract, and the incumbent can
16 decide not to pass franchise fees through. Well, if
17 you're looking at, you know, a million-dollar a month
18 customer, you know, five-percent of a million dollars
19 is real money to a company like mine; we can't eat it,
20 we can't spread it out over a large rate base. So,
21 you know, it will cause us to lose contracts.

22 Another thing is, you know, a lot of our
23 debt covenant, our ability to stay in business right
24 now is dependent on us making a profit. There are a
25 lot of CLEC's that have debt covenants that are

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1 dependent on things like revenues. Ours aren't
2 revenues; ours are actually on profits. We can't just
3 go out and sell the service at any price. We have to
4 actually sell the service at a price that recovers its
5 cost, and we have to pass through those franchise
6 fees.

7 So you can put the slide up now and get
8 onto the presentation. What I wanted to talk about
9 was the court cases, and I think what we really can
10 see is that there's not a clear answer out there. We
11 have so many different people involved. We've got the
12 FCC, we've got state jurisdictions, we've got the
13 courts, and we're getting contrary results from all of
14 them. The most recent circuit court's decision
15 interpreting a Section 253 was the TCG New York versus
16 the City of White Plains, and in that decision, the
17 Second Circuit declined to reach the issue of whether
18 or not a franchise fee is based on percentage of the
19 provider's gross revenue or fair and reasonable
20 compensation for the use of the public right-of-way.
21 Instead, the court struck down the city's ordinance on
22 the grounds that it was discriminatory.

23 The fatal point being is, as we've
24 discussed already, is that the incumbent didn't have
25 to pay the franchise fee. Well, when you have the

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1 courts addressing these issues, in this situation,
2 they completely get around having to address whether
3 or not what is fair and reasonable compensation. So I
4 think it is just very important that we have some
5 guidance from a regulatory body. There's no question
6 that the states are going to be critical in doing
7 this, but I think it's very important that we get some
8 guidance from the FCC.

9 I was actually a staff member with the
10 Texas Legislature when HB 1777 was negotiated, and the
11 only reason that there was a bill is because somebody
12 with authority, Representative Woolens from the city
13 of Dallas, whose wife happens to be the mayor of
14 Dallas now, you know, sat everybody in a room and
15 said, we're going to do something, I'm passing
16 something, either you work something out or I'm going
17 to do what the cities want to do, was essentially, you
18 know, his position. So we all negotiated, and we got
19 something that is not, by no means, perfect, but Texas
20 is not a place where we're having issues getting into
21 the rights-of-way right now because of the system in
22 place.

23 As you can see, all the panelists up here
24 today talk, I thought your presentation, Don, was very
25 entertaining but very much just the city perspective,

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1 and I think it's just critical that we get some
2 guidance from regulators and force this issue to be
3 resolved because, if it's not resolved, you're not
4 going to see facilities-based competition. You had
5 mentioned, Don, that there was a over-capacity in
6 telecommunications facilities. Well, the over-
7 capacity is in the long-haul sector of the market, not
8 in the short-haul. Time Warner Telecom is one of the
9 only companies actually going out and building local
10 facilities, and we do it not just in the major cities
11 but in the suburbs. There is no over-capacity there.

12 In fact, if we could get in and build more, then you
13 would see some of the capacity in the long-haul
14 markets actually utilized effectively.

15 That's essentially what I wanted to say
16 today.

17 MR. MAHER: Thank you, Kelsi. Our next
18 speaker is Larry Doherty, who's Director of National
19 Site Development, the West Region, for Sprint
20 Spectrum. He's a land-use planner. He has 30 years
21 of experience in all related disciplines to land-use
22 planning and project management. He directs the
23 current development of wireless applications within
24 rights-of-way throughout Southern California. This
25 requires the design, permitting, and construction,

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1 working with more than 20 state and local
2 jurisdictions, and this has involved, so far, more
3 than 2500 pole attachments. Larry?

4 MR. DOHERTY: Thank you. I'd like to also
5 thank the Commission for the opportunity for wireless
6 to be on this panel today. It's, to some people,
7 might be a bit strange, but we're a new entrant into
8 the right-of-way issue. So before I start, I would
9 like to make one thing clear: I'm not an attorney.
10 There are a few of us up here. But I do have some
11 real experience in the field, and I'd like to share
12 with you today a little bit of that experience.

13 Some of the issues that we face, as a new
14 entrant, into the right-of-way development and
15 deployment of our facilities.

16 Why right-of-way, why wireless? Well, our
17 perspective is a little different. Sprint and other
18 wireless companies are starting to focus on right-of-
19 ways throughout the nation as an essential element to
20 providing the service throughout the country, the
21 service that the public rightfully demands.
22 Traditionally, wireless is built on private
23 properties, and as we have done so, we have provided a
24 pretty darn good service throughout most all the
25 commercial areas, as well as the major thoroughfares.

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1 However, we have seen a dramatic shift in
2 the use of wireless by the public to the residential
3 sector. As a matter of fact, as you all probably
4 know, more than half the population currently
5 subscribes to wireless service, and as a Yankee Group
6 report stated, I believe, just last month or so that
7 three-percent of the households throughout the United
8 States disconnected their wireline service to their
9 homes and rely entirely on wireless.

10 Sprint has observed that public is using
11 wireless service more and more in the late evening
12 hours, when most Americans are at home. This is the
13 area where our service is not the best, this is the
14 area where facilities need to go, but it's my
15 experience that local jurisdictions often do
16 everything possible to keep these facilities outside
17 of the residential areas and the suburbs.

18 On one hand, the communities and their
19 citizens demand dependable, uninterruptable, and high-
20 quality wireless service throughout their communities
21 and deep into the residential areas. On the other
22 hand, the industry, the wireless industry is faced
23 with an ever-increasing local requirement and
24 obstacles that delay our deployment into these areas.
25 To me, attaching to the infrastructure within the

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1 right-of-ways is a no-brainer. The impact is minimal,
2 the benefits are enormous.

3 Sprint believes in this so strongly that,
4 over the past couple of years, we have developed new
5 technology, equipment, and construction techniques to
6 eliminate or significantly reduce the impact of our
7 facilities on the public right-of-way. As a matter of
8 fact, if I can have the slides now, I thought I'd
9 bring along a couple of photographs of what these
10 facilities look like.

11 This is a wireless facility in the right-
12 of-way in the Los Angeles area, and if you'll take a
13 look at -- there's two poles there, one is being
14 removed, the other one is a new pole, but you can see
15 some cross-arms on the pole and there are antennas
16 hanging from that cross-arm. All the equipment is
17 vaulted below ground, and at the base of that street
18 lamp, there are a couple of ventilation tubes in order
19 to circulate the air through. This is what the
20 sidewalk looks like. We don't impede traffic
21 whatsoever. It's a very innocuous kind of
22 installation.

23 As a matter of fact, we had this open the
24 day I took the pictures, and several neighbors came
25 across and were curious, they had their kids with

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1 them. They were really curious about what we put
2 underground, and with Halloween coming up, the father
3 told them, See? There are no spooks in here. I
4 thought that was clever.

5 This is opened up for servicing by
6 technicians. You can see the antenna up on the pole.

7 This is a little different antenna configuration. We
8 left the antennas wide on purpose, so you could see
9 them. We paint them brown, and they pretty much
10 disappear into the existing urban structure there.
11 And in this case, the cabinets are above-ground. This
12 was an early attempt, about five years ago or so, at
13 wireless on a traffic standard and streetlight in a
14 very upscale urban community. I never heard any
15 complaints over this one. Again, antennas are
16 attached to the pole. The equipment is behind the
17 sidewalk and right-of-way.

18 Our problem is access and probably equal
19 access. We're treated much differently than any other
20 user of the right-of-way. We're required to go
21 through exhaustive discretionary processes with the
22 local jurisdiction, and when we do the research in the
23 jurisdictions to determine who else goes through
24 these, we never find any of the other users of the
25 right-of-way applying for condition-use permits. It's

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1 only the wireless that has to do this. These
2 processes last anywhere from six months to two years.

3 And, at the same time and shortly after
4 that, then we must negotiate an agreement to use the
5 right-of-way with each and every jurisdiction that we
6 go into, and each and every jurisdiction has a whole
7 different set of criteria, a whole different
8 definition of what reasonable compensation might be.

9 As a matter of fact, I've seen situations
10 where we pay as little as a few hundred dollars a year
11 for one of those facilities that I showed you to
12 \$2,000 a month for one of those facilities I showed
13 you, so it's across the board, and it really doesn't
14 make any sense to us. I don't know if it really makes
15 sense to the public either. The wireless industry
16 needs some help in working through the local
17 jurisdictions, not on a one-by-one basis but a basis
18 that sets a level playing field for all the users of
19 the right-of-way.

20 Reasonable compensation, I'm not really
21 sure what that really is. We talk about going back to
22 the jurisdictions and paying them for their out-of-
23 pocket expenses. I think many of us do believe that
24 that's the right thing to do for the right-of-way
25 that's held in trust for the public. But, again, we

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1 see it across the board. There is no rhyme and reason
2 to it. We ask jurisdictions what's the basis for
3 their fees or use fees or license fees or whatever
4 they may call them in the agreements, and we just kind
5 of get, well, that's what we charge, and there's no
6 real basis for it that we can find. In fact, in most
7 situations, we have to pay pole owners to attach to
8 the poles, and they're paying local fees, as well.
9 So, in fact, the jurisdictions are getting it from the
10 pole owners, and they're also getting it from us; sort
11 of double-dipping the industry.

12 I'd like to go ahead and close with asking
13 the FCC, at the minimum, and other federal entities to
14 provide general guiding principles that we call can
15 look to. And Sprint would like to endorse or, at
16 least, favor the NTIA administrator, Nancy Victory's
17 principles and those described in PCUS. Thank you
18 very much.

19 MR. MAHER: Thank you. Last, but not
20 least, we have Dr. Barry Orton, who is Professor of
21 Telecommunications in the Department of Professional
22 Development and Applied Studies at the University of
23 Wisconsin □ Madison. For 20 years, his primary duty
24 at the University has been to assist Wisconsin
25 municipalities with broadband issues. Dr. Orton is an

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1 original founder of NATOA, and he currently serves as
2 president of the Wisconsin chapter of NATOA. He
3 directs the University of Wisconsin □ Madison's
4 outreach seminars and local cable franchise
5 administration and is on the board of contributors of
6 several legal newsletters and industry publications.
7 So without further ado, and he has a display, I
8 believe.

9 MR. ORTON: Thank you. Yes, I'm also not
10 a lawyer and also a city planner, and that's maybe a
11 first up here. The title of my presentation is "Local
12 Public Rights-of-way:" and, of course, us academics
13 have to have a colon, "Users Should Pay the Real Value
14 of Very Expensive Public Property (Just Like Rights-
15 of-Way on Federal Land)" and this is the most
16 important part, "It's Not Only Money That Matters."

17 No matter how high-tech the industry, we
18 still have to dig in the dirt, and that's a quote from
19 Ed Coops, Engineering Vice President of Next-Link,
20 who, basically, and I think most of the industry
21 understands there is no one-size-fits-all answer to
22 any of these questions because all communities are
23 different, all geological, geographical situations are
24 different, and, certainly, all rights-of-way are very
25 different.

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1 I seek to highlight today just how complex
2 some of these decisions are and how ill-equipped the
3 Commission is to deal with them on a case-by-case
4 basis. Yes, I did bring a prop. I didn't bring it,
5 Leonard Crumb brought it here from Minneapolis and
6 it's, in fact, a model of a street under downtown
7 Minneapolis, and if you could remove the street and
8 the fire truck, we have here, and this is actually an
9 older model with very little telecommunications
10 facilities, Leonard assures me right now it is much
11 more crowded under the street on that particular
12 intersection thanks to increased telecommunications
13 capacity. And each piece of overcrowding or crowding
14 makes the right-of-way more difficult to excavate, it
15 makes the right-of-way more difficult to maintain, and
16 Leonard had some sample pieces of sewer pipe that he
17 was trying to put under the system, digging as if he
18 would be digging through, and the problem is that, as
19 it gets more crowded, the length of the pipe doesn't
20 change any, and you have to squeak it in under the
21 things that are already there.

22 Basically, this is a fairly simple one. I
23 work for the city of Milwaukee, and, in my
24 presentation, I describe what's under the city of
25 Milwaukee streets, and that includes everything here,

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1 plus wooden ducts dating back at least a hundred
2 years, in some cases. Some of those wooden ducts
3 contain existing and operable electric power lines.
4 Some of them contain existing and potentially
5 operable, we're not sure until we cut them,
6 telecommunications lines dating back to telegraph.
7 Some of them contain wires that used to support some
8 of the trolley lines, and some of them don't contain
9 anything we really know about yet, and when we cut
10 them or when they get cut, we just find out if they
11 contain anything by how many people call and find out
12 what went out.

13 So to finish that and to show how this
14 one-size-fits-all model doesn't work, the person who
15 knew that system best in the city of Milwaukee retired
16 two years ago, and his replacement has a total of two
17 years experience on the job, so the maps supporting
18 that are literally thousands of them in tens of
19 locations, and there is no one way to understand
20 what's under any individual street at any given point,
21 and that's not a unique situation.

22 So local government's first priority in
23 all this is to really protect the public's safety, and
24 that really is the first priority. And without the
25 right to manage the rights-of-way with a one-size-

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1 fits-all uniform priority, where you don't have
2 patchwork systems, you're not vulcanized, and,
3 perhaps, you have some kind of federal mandate. Then
4 should any entity with a state CLEC certificate, a
5 backhoe, and a spool of fiber cable be allowed to open
6 streets' boreholes, interducts, trench through
7 subdivisions, and string wire between poles? Clearly
8 not.

9 When construction is eminent, municipality
10 has to have permits, has to investigate who is going
11 to open the street, what kind of insurance is
12 required, make sure there is indemnification, and I
13 list a lot of those steps; and they are not steps to
14 make the industry suffer, they are not steps to make
15 it more unprofitable for the industry; they are
16 protection steps to protect one of the most valuable
17 pieces of property the local public owns and has
18 developed: the rights-of-way. And this last
19 responsibility on safety is easily understood here in
20 Washington, where, I understand, a year and a half
21 ago, matters got so bad that we had a moratorium, so
22 that we would actually have cars that went on the
23 streets rather than sinking into them.

24 The second thing cities have to do is they
25 have to protect the public property. And attached to

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1 my presentation is a list of just some horror stories
2 of gas lines, power lines, water mains, phone lines,
3 steam lines, sewer lines being, in some cases,
4 exploded by wrong locates or the abhorrent backhoe.
5 Local government has to assure that the public
6 property is then restored to an equal or better
7 condition, and that really, again, involves expense on
8 the local side. So the examples of that kind of
9 management are in the bill or in the statute, they're
10 certainly in the legislative history. We don't have
11 to go through that again.

12 Then the next part, which is the part
13 that's getting controversial here, is the reimbursing
14 of the public. Specifics, because they vary from
15 state-to-state; states differ. The jurisdiction's
16 immediate goal is to get its out-of-pockets covered,
17 and that we talked about; I don't think there's any
18 disagreement about that. But it's not just what you
19 paid in advance and what the city has to pay to get
20 you in there. The telecommunication industry tries to
21 seek to limit the public compensation of rights-of-way
22 to these direct costs, labeling them fair and
23 reasonable, and everything else then, by comparison,
24 is unreasonable. I have a technical term for that
25 assertion. It's called "chutzpah." And for those of

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1 you who are not familiar with it, the definition of
2 that technical term is the defendant, who upon charged
3 with the murder of his parents, throws himself on the
4 mercy of the court because he's an orphan. That's
5 chutzpah. That's what we have in this case.

6 We have significant real costs here. We
7 have degradation costs of additional users, and every
8 time you dig it up and patch it over again, the useful
9 life decreases. You have a disruption factor, which
10 are serious factors. People have to go around
11 excavations. Businesses lose money while the
12 excavation is going on. These are all real losses.
13 The sales tax loss and the loss of going around
14 construction is only the small part of that.

15 And then lastly and most important, you
16 have rent. I know it's an evil word here, but rent is
17 what it is. If I want to rent space in a shopping
18 mall, I might pay an option fee, I might pay a per-
19 square-footage fee, and I might pay a rent based on
20 the position in the mall based on the economic value
21 of what I am occupying. You cannot ignore those
22 standard economic factors when you look at right-of-
23 way, unless you make the argument that the federal
24 government has declared this so important that we
25 don't compensate anybody and everybody develops

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1 anywhere, and we don't do it that way. We certainly
2 don't do it in the private sector, and we don't do it
3 in the federal government either.

4 I went to the Bureau of Land Management
5 and found out when you want rights-of-way on federal
6 property, you pay a processing fee, you pay a
7 monitoring fee, and then you pay a fee called rental,
8 payable before the grant is issued based on the fair
9 market rental value for the rights authorized. The
10 rental values are based roughly on the land values and
11 are sometimes even established by an appraisal. Why
12 would the Congress establish a different or more
13 limited right for local governments?

14 Finally, while all these arguments are
15 proceeding in the courts and the Legislature and the
16 Congress, local officials routinely enforce the safe,
17 basic requirements necessary to ensure the public
18 rights-of-way remain safe and functional with minimal
19 financial burden to the taxpayers. These requirements
20 are enforced daily without fanfare, without debate, as
21 we all use the rights-of-way to heat and light our
22 homes, walk, drive, communicate, access information,
23 bathe, and flush our toilets. Thank you.

24 MR. MAHER: Thank you, and we will start a
25 discussion now. I think the format in the last panel

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1 worked very well, so I will open it and start back
2 down at the other end, if anyone has any comments on
3 the other presentations. Sandy, you can lead off.

4 MS. SAKAMOTO: I think our view, from the
5 industry's perspective, is that we do need some
6 guidance from a policy-making body to urge and
7 encourage the national policy on telecommunications.
8 And nobody in the industry disputes that there is
9 legitimate and valid right-of-way management authority
10 that local governments have. They have a very
11 important role, there is no doubt about it. They have
12 a role to make sure that their rights-of-way are
13 managed in a way that is safe for the traveling public
14 and for other users of the right-of-way. And
15 businesses, like telecommunications and other users of
16 the right-of-way, also have that same interest. We
17 have no desire to irresponsibly come into a city
18 because it's not good business, ultimately. So I
19 think there's some common ground there.

20 But what we have seen, unfortunately, are
21 a minority, frankly, of jurisdictions who have taken
22 liberties, sort of, with this notion that they can go
23 beyond those traditional police-power authorities and
24 begin to create what we view as obstacles to proper
25 construction and infuses one area of that. And that's

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1 where we, I think, need the help.

2 I will say that, while, you know, there's
3 a lot of dispute as to what the right model is for
4 fees, you know, how do you assess fees and on what
5 basis, I can say that if fees are somehow sanctioned,
6 fair and reasonable compensation under 253(c), is
7 sanctioned either by the courts or this Commission as
8 being something that can be above cost. In other
9 words, revenue-producing or profit-making fees for
10 local governments, that the moment that occurs, quite
11 frankly, and I wouldn't blame them, every local
12 government will certainly come to the well and want
13 their share of that new source of revenue. And I
14 think we need to think very carefully about whether
15 that's the right policy. When we talk about trying to
16 create a very robust, competitive environment for
17 telecommunications, it will, in any given
18 jurisdiction, out-price a certain competitor or many
19 competitors. Not every competitor, perhaps, and that
20 wouldn't be right, and no city would do that, but it
21 will out-price certain sets of competitors, and is
22 that really what Congress desired?

23 MR. MAHER: Don, what about it?

24 MR. KNIGHT: Thank you, Bill. One thing I
25 wanted to respond to is Kelsi's remark that there's no

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1 over-capacity in local neighborhoods, and I couldn't
2 agree more with that. One of the reasons that's true
3 is that local governments are powerless to require it,
4 unlike cable, where we can require it and cable
5 extends to every household, you know, in the
6 community. The problem with that scenario is, if
7 we're talking about the kind of disruption that we saw
8 in our major thoroughfares now in every neighborhood
9 in the community, we've got to think about how we're
10 going to deal with that, as well.

11 There has been a lot of discussion about
12 right-of-way management, as well as just the
13 compensation for it, and that cities need to be
14 restricted. It reminds me of a comparison to our
15 traffic laws because there's probably nobody in this
16 room that likes to get a traffic ticket, and there's a
17 lot of people that might want to go a little faster
18 than the posted speed limit at any given time. But,
19 yet, there doesn't seem to be any national movement to
20 do away with traffic enforcement, and the reason for
21 that is because, while we know we're all safe drivers,
22 we're worried about the rest of the guys on the road.

23 Okay. And that's the problem you have here, and it's
24 why you heard Sandy say, you know, they support right-
25 of-way management. That's been my experience. No one

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1 in the industry wants the cities to get out of the
2 right-of-way management business. They'd like to see,
3 you know, some things not specifically applied to them
4 but, you know, the other guys, we're glad you're out
5 there to keep them from damaging us.

6 So talking about fair and reasonable
7 compensation, I keep asking myself this because I keep
8 hearing from the industry cost-based, if it's not
9 cost-based, it's not fair. What is unfair, what is
10 unreasonable about asking them to pay what it is
11 worth? We're not hearing it's not worth what cities
12 are asking for it, they're saying that it should be
13 cost-based because if it's more than cost, it's
14 unreasonable and unfair.

15 Now, Sandy referred to new sources of
16 revenue and that cities see the Telecommunications Act
17 is a chance to go out and get more money. I have not
18 seen that. All I have seen is that communities want
19 to be able to collect the compensation that they have
20 collected for the last 100 years. This is nothing
21 new. You know, what's unfair about the same
22 compensation that you've been paying for a hundred
23 years to use the right-of-way?

24 And I realize the law may be different in
25 other states. There's some states where the incumbent

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1 doesn't pay a fee because they negotiated a good deal
2 a hundred years ago. That was pretty short-sighted, I
3 think, but, in Texas, we don't suffer from that. So
4 let's not forget that telecommunication companies have
5 been paying usually a percentage of gross revenues
6 since they came into existence, so this is not an
7 argument that started after the Telecommunications Act
8 of 1996 and cities are not going out and saying, oh,
9 boy, we've got a windfall here. We just want to do
10 business the way we always have in the sense of
11 collecting compensation for value. Now there's a lot
12 more people wanting to get in there, and we want to
13 treat them all the same. We want to charge them the
14 same amount. That's all I have. Thanks.

15 MR. MAHER: Okay. Kelsi?

16 MS. REEVES: I wish it was that simple. I
17 mean, I don't think that it is. I don't think that
18 what we're going out and finding is that cities just
19 want to charge us a rent for the value of the property
20 and you get to just do that. But in Texas, what we
21 found is that a bunch of different cities had
22 negotiated flat fees from the incumbents, and it was
23 hard to tell what they were based on, you know, what
24 services and what revenues they were based on. And so
25 when you have to go in with like what you have to do

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1 in Texas right now, it's based on access lines, people
2 measure access lines differently. I mean, no wonder
3 Texas is having a hard time implementing that law is
4 because it's hard for, I mean, we do it differently
5 from the way other companies do it, and it's hard for
6 us to file those reports. It's impossible for, I
7 think, the cities to really know whether or not they
8 are getting what they are supposed to be getting, and
9 to try to compare it to what other companies are doing
10 is just a really difficult task. So I don't think it
11 is as simple as just paying rent. If it were, then we
12 wouldn't be here.

13 What you're finding is different things in
14 every, you know, different things in different cities,
15 different things in different states, and what we need
16 is some consistency. I don't think anybody in the
17 industry would argue with the fact that the cities
18 need to manage the right-of-way, and I think that the
19 work that we've been doing on our model ordinances
20 recognize that, and what I hope we can do is recognize
21 that you need to manage the city, your resources
22 should be focused towards that, and get out of these,
23 you know, two and three-year long negotiations over
24 price. I mean, we really are talking about money. If
25 we could resolve that issue, you could spend your

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1 time, the cities could spend their time managing the
2 right-of-way instead of negotiating these ridiculous
3 contracts.

4 MR. MAHER: Okay. Larry?

5 MR. DOHERTY: Again, I think, in my view,
6 the real problem is there's absolutely no definition
7 that anybody agrees to. When I worked with the
8 jurisdictions, every jurisdiction has their own idea
9 of what compensation truly is. It's across the board,
10 and it doesn't make any sense. And for telecom to go
11 in and have to negotiate these on a one-by-one basis
12 with virtually no insight as to what they're going to
13 end up, you can't sustain an operation like that. It
14 becomes so cost-prohibitive to go into certain areas.
15 It becomes a barrier to access to areas.

16 It is important to note, too, that all
17 that does is drive up the cost for the consumer, as
18 well, because these costs are being passed through.
19 And so, in effect, we're charging, the jurisdictions
20 are charging their citizens for the use of the right-
21 of-way, as well. So it goes on and on. We're looking
22 for some general principles. I think the industry and
23 local government and the FCC need to come together and
24 devise some common principles that we can all look
25 towards. And I believe it's going to take a lot of

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1 work, but I also believe it is possible.

2 MR. ORTON: I want to say that I don't
3 think there's any other situation where the owner of a
4 valuable property is expected to charge only the
5 incremental cost of occupancy and not compensation
6 reflecting the value of the property or the value of
7 the property to the user. I've asked my bagel store
8 to cut back on the price of bagels and let the mall
9 owner only charge the cost of the electricity for the
10 bagel store, but it doesn't work that way.

11 MR. MAHER: I have a question, and it goes
12 back to these revenue-based fees. It's hypothetical,
13 and you can consider me playing a devil's advocate,
14 but aren't there circumstances where these fees really
15 make sense, if you're thinking about
16 telecommunications competition? I mean, to the extent
17 that a new entrant doesn't have to put up a big up-
18 front payment, aren't fees based on ongoing revenues
19 one way to permit entry into telecommunications? Or
20 not? I'd be interested.

21 MR. KNIGHT: Could I respond to that,
22 Bill? Absolutely. You know, the reason we have a
23 percentage of gross revenue fee is because that's what
24 municipalities and the telephone company worked out,
25 and the reason it's a benefit to new entrants is that,

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1 until you start getting revenue, you don't pay
2 anything. You can put your facilities in the right-
3 of-way and pay nothing until you start generating
4 revenue, and then you only have to pay a percentage of
5 that revenue. So as you build your business, you pay
6 more, but not until you generate more revenue. And
7 the access line fee statute in Texas is similarly
8 structured so that you only pay for the access lines
9 that you sell to customers. So, again, they can put
10 facilities in the right-of-way at no charge until they
11 start using them to provide a service.

12 MR. MAHER: Any comments from the
13 carriers?

14 MS. SAKAMOTO: Yes, I guess a couple of
15 issues. First of all, while, in fact, that may be one
16 way of gaining compensation, it really is in the form
17 of a tax. What you're talking about is a fee based on
18 the business operations and revenue flow of that
19 particular entity. We're not talking about
20 compensation for use of the right-of-way. They're two
21 very distinct and different things, and I don't think,
22 if we look at 253(c), that that type of fee is
23 contemplated because it has nothing to do with use or
24 management of the right-of-way. I'm not saying that
25 it couldn't be imposed in proper situations or that it

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1 couldn't be a proper form of some level of a tax
2 revenue if properly enacted, but I don't believe that
3 it fits within the structure of what local authority
4 can do under its police powers in managing the right-
5 of-way under 253(c).

6 MS. REEVES: And I would just add to that
7 that it would be one thing if that was a federal
8 policy and it was applied across the board. Then
9 people would make it work. But right now what you
10 have is, you know, the pass-through is a significant
11 deal. I mean, if not every competitor is required to
12 pass it through, there are a lot of companies that are
13 in many lines of business, and it's hard to tell what
14 revenues you're actually assessing. Different people
15 offer different types of services. The cities are
16 always in arguments about which services should be
17 taxed and which services shouldn't be taxed, so that's
18 not even a simple fix.

19 MR. MAHER: Okay. I'd like to open it up
20 to the audience right now. Right there.

21 MR. ASHBUM: Hi, my name is Garth Ashbum.
22 I work for local government. Just two comments here.
23 One, I find it difficult to understand how
24 Southwestern Bell or SPC can advocate incremental
25 costs when people are trying to access their system

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1 and they have to pay fully-allocated costs. The
2 second thing is that, when we're looking at that this
3 is passed on, that this is a cost increase to the
4 users, I think that you fail to realize that the costs
5 that are there are being borne by taxpayers. And if
6 there are costs that are associated with it and
7 they're going to be paid by taxpayers instead of the
8 user, I don't think that's fair to the folks in the
9 community.

10 MR. MAHER: Any response?

11 MS. SAKAMOTO: Taxpayers are paying for
12 the investment in the public rights-of-way, indeed,
13 and the cost-based model for compensation for use of
14 the right-of-way is to, in fact, reimburse and to make
15 whole the taxpayers loss or cost through the
16 management by the city, who stands as a trustee over
17 those rights-of-way. So the taxpayer isn't losing
18 out.

19 Nobody's suggesting, from the industry's
20 side, that a loss or a cost that's borne or incurred
21 for use of the right-of-way should not be compensated.

22 What we're talking about, I think where the debate
23 really is, is whether or not fees above costs, fees
24 that are really profit-making in nature are
25 appropriate when we talk about use of the right-of-

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1 way.

2 Moreover, the right-of-way is dedicated
3 and is there for the public's use. It's dedicated for
4 public use, and that provides an avenue for a number
5 of classes of users. It isn't just the traveling
6 public we're talking about, it is the subway systems
7 and the public utilities and the municipal utilities
8 and the cable television. Everybody that has a public
9 service that they offer that needs that right-of-way
10 to offer and deliver those services is providing the
11 kind of public benefit that that right-of-way was
12 intended to provide.

13 So I think when we talk about, you know,
14 rental or paying for its value, well, it's value is,
15 as a right-of-way, to provide a public benefit. Part
16 of that use, a compatible, co-existing use, is
17 telecom, just like it is with water or just like it is
18 with a trucking firm that uses it or just like it is
19 with any other user of the right-of-way. So why
20 should telecom be singled out or treated differently?

21 Moreover, I have to tell you that everyone
22 of those classes of users have different regulatory
23 regimes. Right or wrong, whether you like it or you
24 don't, they developed in different ways. So, you
25 know, you do have a mixed bag when you talk about the

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1 different types of users that take advantage of the
2 public rights-of-way.

3 MR. MAHER: Don?

4 MR. KNIGHT: Thank you, Bill. First of
5 all, if I understand what Sandy's saying. She's
6 saying, you know, the taxpayers pay taxes, the taxes
7 go to maintain the right-of-way. They've already paid
8 for it once, let's not charge them for it again. And
9 if that's what she's saying, I would respond that the
10 reality is that if we do away with right-of-way fees,
11 we're going to be talking about a lot more taxes than
12 they're paying right now. Many cities, 20 to 30% of
13 their revenue comes from right-of-way fees, and that
14 means they don't have to raise tax money for that 20
15 or 30%. Now that's all users of the right-of-way,
16 that's not just telecom.

17 You know, Sandy mentions that a lot of
18 users use the right-of-way, and that's true.
19 Telecommunications companies, gas companies, electric
20 companies, water companies, they all pay to use the
21 right-of-way, and nobody is asking to use it for cost,
22 except for the telecommunications companies. Every
23 other user of the public right-of-way pays the value
24 of that property when they use it.

25 You know, I think the argument that this

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1 is dedicated to public use and it's preserved, it's
2 held in trust for the public, therefore, we shouldn't
3 be charging for it. And this is the point that the
4 telecommunication companies are not the public, okay?

5 The public is the citizens within that community, and
6 if the citizens within that community want their local
7 government to subsidize a telecommunications company
8 so they don't have a fee on their bill, they could let
9 their city council know that. But you know something?

10 In all the years that I've been in local government,
11 I have never heard a single citizen tell me that we
12 should be allowing these companies in the right-of-way
13 for free. I've never heard a single citizen complain
14 that they don't want a charge for right-of-way use on
15 their bill. They understand it's the cost of doing
16 business. Citizens are not upset about this, okay?
17 It's the telecommunications companies that are passing
18 those costs to the citizens that, for some reason,
19 have a problem with it. The people that are paying
20 the bills don't.

21 MR. DOHERTY: Just a quick comment on
22 that. I don't think the industry has ever said that
23 we're not willing to pay for the use of the right-of-
24 way. I just want to make that clear. We do expect to
25 pay for the use of the right-of-way. Our position is

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1 that unreasonable fees should not be charged. We want
2 fair treatment for the use of the right-of-way, and I
3 think that's what this forum is all about, not to
4 point the finger at one another and simply say that we
5 don't want to pay because that's not the case.

6 MR. MAHER: Okay. Question right here.

7 MR. BRILL: Yes, my name is Robert Brill.

8 I guess, Professor Orton, I have to respond to your
9 use of the chutzpah analogy to say that the question
10 from the telecom perspective is are the cities and
11 localities acting as khazers, which is another
12 response.

13 But, really, what we're talking about is
14 line drawing. I agree that I don't know anyone in
15 telecom who says that there shouldn't be recompense
16 for the reasonable use of the right-of-way, in terms
17 of the cost to the municipality. The real question is
18 what the Professor has pinpointed, which is paying
19 what it's worth. My response is or is it paying all
20 that the traffic will bear? The question is is the
21 public right-of-way a scarce commodity, as it were,
22 that is, in effect, a monopoly control of the
23 locality? And the question is, to foster competition,
24 does that scarce resource have to be regulated and,
25 hence, to draw analogy from telecom before the 1996

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1 Act, there has to be someone who either sets some
2 guidelines to what can be charged above the cost, or
3 it should be some type of regulated price, and
4 somebody's got to regulate that?

5 So, I mean, it seems to me the question of
6 your shopping center is there's always a shopping
7 center somewhere else or a store somewhere else that
8 can compete, but how does a telecom provider in a
9 particular city find another access, except for
10 private property which, in wireless, is possible, but
11 if you're a broadband provider, you have to use the
12 ground.

13 MR. MAHER: Barry?

14 MR. ORTON: Well, a couple of responses.
15 I don't want to get into Yiddish too heavily. I think
16 the appropriate word for the industry in this case are
17 gonifs, which they're trying to steal something that
18 doesn't belong to them that the public built, that the
19 public owns, and want it at a bargain price because
20 telecommunications, in the Telecom Act, is something
21 magical. It isn't. It's one part of our economic
22 development, but it's not a magic part. And so we
23 don't douse local government with magic dust so that,
24 all of a sudden, the only thing that costs are their
25 out-of-pockets when you get an application. The cost

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1 of building and maintaining a very complex situation,
2 particularly in larger cities, is enormous, and the
3 taxpayers paid for that. So to argue that the real
4 cost is the incremental cost when we get there and
5 when we build is to ignore all the other costs that
6 went into the whole process.

7 And it, also, I think, ignores, and we say
8 it again and again, the legislative history of the
9 Telecom Act that got us here. I really think you
10 should read the detailed legislative history because
11 there were votes on these explicit issues both in the
12 House and in the Senate. I don't have the Senate
13 numbers. I do have the House numbers, and it was
14 something like 338 to 86. The idea that this stuff
15 would only be at out-of-pocket costs was defeated
16 really soundly, was very explicitly argued in both
17 houses and defeated soundly in both houses. You can't
18 go back and say, well, the Congress really meant to
19 put a C in the list of what the FCC did in Section D,
20 but they just ran out of letters or something, so
21 we'll just pretend it was there. You can't do that.
22 The Congress debated this, and it was very explicitly
23 voted on.

24 MR. MAHER: Okay. We have time for one
25 last question. This panel has been going very well,

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1 and we'll have to close.

2 MR. PINTO: My name is John Pinto. I'm
3 your right-of-way consultant, and I've dealt with the
4 telecommunications industry and long-line industries
5 for about 20 years, and I just would like to pose to
6 those members of the panel that don't we have here
7 somewhat of a contradiction or an inconsistency when
8 most, if not all, long-access providers over the past
9 10, 15, 20 years ran to piggyback on existing
10 corridors of railways, pipelines, and other types of
11 corridors, didn't care what they had to pay, as long
12 as they could get there ahead of the other guy. And
13 now they get to the gate of communities and say, gee,
14 we don't want to pay what the traffic will bear, we
15 want it, essentially, for a justifiable cost. That
16 question was never posed to those owners of corridors
17 and other avenues to get you to where you are now in
18 the communities, so why do the communities have to
19 bear an inequitable participation in this process?
20 Thank you.

21 MR. MAHER: Reactions from the carriers?

22 MS. SAKAMOTO: Well, I'm no expert on
23 railroad right-of-ways. The right-of-ways, however,
24 that railroads do own, I mean, they own them. Those
25 are their rights-of-way, and they were acquired for

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1 purposes of their business for the railroad.

2 Now when those rights-of-way were
3 abandoned because of disuse or other reasons, and they
4 wanted to either lease them out or sell them outright
5 or whatever, like a property owner, they could do that
6 and charge what was fair under some sort of rental,
7 fair-market rental or fair-market price for those
8 rights-of-way.

9 We're talking about public rights-of-way
10 that are streets and roads and highways that were
11 acquired for public use, dedicated for that purpose
12 using taxpayer dollars, for the most part, or
13 dedicated to the city by private developers because of
14 the impact that their development was going to have in
15 the community. So I think there is a difference.

16 MS. REEVES: I would just say that, you
17 know, there's just this false idea there that we are
18 all willing to pay reasonable prices for access to the
19 right-of-way. We just ask that they be reasonable and
20 that they be applied in a nondiscriminatory manner.

21 MR. MAHER: Okay. I'd like to thank the
22 panelists and also the audience for your
23 participation, and we will convene at 2:00. Thank
24 you.

25 (Whereupon, the foregoing matter went off

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1 the record at 12:30 p.m. and went back on
2 the record at 2:06 p.m.)

3 MR. SNOWDEN: Don and fellows, can we take
4 our seats? Welcome back from lunch. I hope you
5 enjoyed our fine cuisine in the two of our finest
6 dining facilities in Washington, D.C.

7 It is my privilege to introduce the next
8 speaker. Nancy Victory has the unusual distinction of
9 playing two roles at once in the Bush Administration.

10 As Assistant Secretary of Commerce for Communications
11 and Information, she reports directly to Commerce
12 Secretary Don Evans and oversees the agency within the
13 Commerce Department that manages the federal
14 government's use of spectrum. At the same time, she
15 serves as Administrator of the National
16 Telecommunications and Information Administration, or
17 NTIA, and reports directly to the President on
18 communications policy matters. In her dual role, she
19 has made spectrum management and policy issues a
20 priority.

21 Ms. Victory has also focused her attention
22 on issues related to the delivery of advanced internet
23 services. In each role, Ms. Victory has advocated
24 competition, encouraged innovation, and promoted
25 public safety and security. Prior to her appointment

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1 to the Department of Commerce, Ms. Victory was a
2 partner in the Washington, D.C. law firm of Wiley,
3 Rein, & Fielding, where she focused on legal and
4 regulatory issues faced by communications companies.
5 She received her BA from Princeton University and her
6 JD from Georgetown University Law Center.

7 It is my pleasure to welcome a public
8 servant who wears multiple hats and juggles several
9 critical issues at one time, all with grace and ease,
10 Assistant Secretary Victory.

11 MS. VICTORY: Well, thanks for that great
12 introduction, and I thank all of you for coming out on
13 such an awful weather day and for coming back from
14 lunch, too. I very much appreciate that. I saw how
15 crowded it was this morning, I just didn't know who'd
16 be back this afternoon, so good for all of you.

17 I want to thank Chairman Powell and the
18 FCC for convening this rights-of-way forum. I know
19 that you've all been fortunate to hear from state,
20 local, and industry rights-of-way experts today, and
21 I'm pleased to have the opportunity to share the
22 Administration's view with you on this very important
23 issue.

24 Now in the world of telecom policy, we
25 have a natural human tendency to focus our attention

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1 on the high-tech, headline-grabbing issues of the day.

2 Whether it's broadband, the growth of Y-FI (phonetic)
3 services, advances in internet protocol, telephony, or
4 something else, we're instinctively drawn to these
5 issues by the potential they hold for new products and
6 services and the threats that they represent to the
7 status quo. That's the challenge for our regulators.

8 So it's understandable that policymakers would devote
9 time and effort to the subjects that are going to
10 shape the future of the telecom industry for a long
11 time to come.

12 But there is another subject that's
13 equally important, perhaps even more important, to
14 telecom's future. Unfortunately, it's not high-tech,
15 it's not particularly sexy, and the press usually
16 doesn't write front-page stories about it; we'll see
17 after this event. That is, unless something goes
18 terribly wrong. Now, of course, I'm talking about
19 rights-of-way.

20 Rights-of-way, the term conjures up
21 distant memories of dusty law books and arcane legal
22 terms like easements, leaseholds, and appurtenances.
23 Simply put, right-of-way is the legal right to pass
24 through the property owned by another. In the telecom
25 arena, rights-of-way is about digging trenches, laying

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1 fiber, constructing towers, submerging cables, and all
2 of the other things that are necessary to build out
3 and upgrade of the physical infrastructure for modern
4 telecom networks. Sounds pretty basic, doesn't it?
5 And I can think of no issue more fundamentally
6 important to the widespread deployment of broadband
7 and, really, just about any other network technology
8 than rights-of-way.

9 If fully deployed, broadband, which is
10 also known as high-speed internet access, has the
11 potential to revolutionize commerce, education,
12 healthcare, national security, entertainment, and
13 countless other areas for the American people. As
14 such, broadband is really a key to the future economic
15 growth of the telecom industry and to our economy as a
16 whole. But right now, only a relatively small segment
17 of the American population is enjoying the benefits of
18 broadband.

19 In a report co-authored by NTIA and the
20 Economics and Statistics Administration titled "A
21 Nation Online: How Americans are Expanding Their Use
22 of the Internet," we found that 54% of Americans are
23 currently using the internet. However, of those
24 users, only roughly 20% have broadband access. Now,
25 that's only about 11% of the overall population.

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1 Well, data from the FCC and industry sources show that
2 the market for broadband service is continuing to
3 grow. We still have a very long way to go before
4 realizing broadband's full potential, and rights-of-
5 way is a key ingredient in achieving that potential.

6 The Administration clearly recognizes the
7 importance of broadband to America's future. As
8 President Bush has recently emphasized, in order to
9 make sure that the economy grows, we must bring the
10 promise of broadband technology to millions of
11 Americans. Just a few weeks ago, the President's
12 Council of Advisors on Science and Technology, or the
13 PCAST, singled out rights-of-way management as a
14 critical component of broadband deployment. PCAST
15 pointed out that if rights-of-way access is unfairly
16 denied, delayed, or burdened with unjustified costs,
17 broadband deployment is slowed, and our citizens are
18 deprived of access to vital communications facilities.

19 Now, as many of you know, NTIA has been
20 focusing considerable attention on rights-of-way
21 management over this last year. We conducted a
22 broadband forum last fall and launched a broadband
23 deployment proceeding last winter, both of which
24 raised rights-of-way as an issue. We've participated
25 in NARUC's rights-of-way discussions, particularly its

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1 Rights-of-Way Study Committee, and NTIA has also met
2 with representatives of cities and their associations,
3 such as the National Association of Telecommunications
4 Officers and Advisors and the National League of
5 Cities, to identify means for improving and
6 simplifying current processes, where needed, while
7 ensuring sufficient flexibility for municipalities to
8 best serve the needs of their citizens. Right now,
9 we're taking an in-depth look at some communities to
10 learn, up close, how they handle rights-of-way
11 management at the state and local level, and, later
12 this year or early next year, we plan to issue a
13 rights-of-way report highlighting what we've learned.

14 Now, while state and local rights-of-way
15 policies will be crucial to widespread broadband
16 deployment, we're also acutely aware that the federal
17 government manages important rights-of-way over
18 millions of acres of federal land. To make sure that
19 we're doing our part to eliminate any unnecessary
20 impediments in this area, the Administration has
21 formed a federal rights-of-way working group headed by
22 NTIA, which includes representatives from all of the
23 federal agencies with major rights-of-way management
24 responsibilities.

25 The mission of the working group is to

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1 develop best practices for federal rights-of-way
2 management, particularly as it impacts broadband
3 deployment. Some of the primary participants in the
4 working group include the U.S. Forest Service from the
5 Department of Agriculture, the Bureau of Land
6 management and the Bureau of Indian Affairs from the
7 Department of Interior, the Federal Highway
8 Administration from the Department of Transportation,
9 the National Oceanographic and Atmospheric
10 Administration from the Department of Commerce, the
11 Army, Navy, and Air Force from the Department of
12 Defense, and the General Services Administration.

13 Now, the working group met for the first
14 time in July. We've been pleasantly surprised by the
15 enthusiasm with which the various agency participants
16 approached this effort. This is a group that is
17 excited to compare notes on rights-of-way experiences
18 and eager to streamline and simplify this process.

19 The working group has decided to focus its
20 efforts in four basic areas. First, information
21 collection: broadband providers operating across
22 multiple jurisdictions are often required to supply
23 the same information in different applications to
24 numerous permitting authorities. The working group
25 will be looking at ways to streamline and standardize

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1 applications to save time and to reduce costs.

2 Second, timely process: broadband
3 providers have an important need to obtain rights-of-
4 way permits on a timely basis. Otherwise, undue delay
5 can increase the cost of deployment and can sometimes
6 prevent deployment altogether. The working group will
7 be examining rules and procedures that help ensure
8 timely and appropriate action on both rights-of-way
9 application and appeals.

10 Third, fees: this is, perhaps, the most
11 contentious issue in the rights-of-way debate. The
12 nature and amount of fees charged to broadband
13 providers vary widely across different jurisdictions.

14 We'll be scrutinizing various fee structures, looking
15 for approaches that are appropriate and reasonable and
16 that do not unfairly impede the deployment of
17 broadband networks.

18 And finally, remediation and maintenance:
19 we fully recognize that rights-of-way managers have a
20 legitimate interest in ensuring that broadband
21 providers take appropriate action to repair and
22 maintain the rights-of-way that they use. We'll be
23 looking for examples of remediation and maintenance
24 requirements that accomplish these important
25 objectives without placing undue burdens on broadband

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1 providers.

2 Now, at the suggestion of the agencies, we
3 recently invited industry representatives, large and
4 small wireline and wireless, terrestrial and marine,
5 to meet with the working group last month and share
6 their points of view as to where, with respect to the
7 federal government agencies, things are working well
8 and where more attention needs to be focused. Next
9 month, we plan to meet with some of the states and
10 localities to get their points of view. We've learned
11 that in some areas, like highway construction and
12 maintenance, state and local actions can play an
13 important role in the success or failure of federal
14 rights-of-way policies. We want to ensure that
15 federal, state, and local land managers all work
16 together to address these common challenges.

17 And in the months ahead, the working group
18 will be closely examining federal rights-of-way
19 practices and policies, looking for ways to improve.
20 We want to see the federal government lead by example
21 and create a model of cooperation that others can
22 emulate. We plan to issue a report with our findings,
23 as well as recommendations for how the federal
24 government can reform its approach to rights-of-way to
25 help bring the promise of broadband to all Americans.

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1 Now, while there is much work ahead of us
2 and certainly plenty to learn, I wanted to close by
3 sharing with you some of my initial impressions about
4 rights-of-way. First, there are legitimate arguments
5 on both sides of this debate. On one side, the
6 industry, everyone from Bell Operating Companies, to
7 rural carriers, to CLEC's, to cable companies, to
8 overbuilders, to wireless providers, our concern that
9 restrictions and fees imposed by federal, state, and
10 local land managers on accessing rights-of-way and
11 tower sites might be inhibiting or, at least, delaying
12 broadband network construction. On the other side,
13 land managers at all levels of government are the
14 stewards of public property and must ensure that the
15 rights-of-way are used appropriately. Recognizing
16 that each side has legitimate concerns is an important
17 step in the right direction.

18 Second, to make real lasting progress, the
19 tenor of the relationship between rights-of-way
20 managers and the industry needs to change. Today,
21 federal, state, and local officials sometimes view
22 broadband providers as trespassers who should be kept
23 out, rather than customers who should be invited in.
24 A more responsive customer-oriented approach to
25 rights-of-way management is essential to removing

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1 barriers to broadband deployment. But just as
2 storekeepers don't permit inappropriate behavior in
3 their stores, government officials must be allowed to
4 place reasonable limits on broadband providers'
5 activities.

6 Finally, to move forward on rights-of-way,
7 we all need to work cooperatively. One of the great
8 attributes of modern networks is their
9 interconnectedness, which allows communications
10 between individuals across the street and around the
11 world. At the same time, this means the rights-of-way
12 disputes can have a disproportionately adverse affect
13 on the roll-out of regional, statewide, national, or
14 global networks. By working with each other to
15 address common problems, we can achieve common
16 solutions. Your participation in today's forum is a
17 good sign that we can, indeed, make progress on
18 rights-of-way and bring the promise of broadband to
19 all Americans. Thanks, again, for inviting me to
20 speak today, and I'm happy to address any questions
21 you all might have. Yes?

22 AUDIENCE MEMBER: The people that you're
23 talking to, basically, are, basically, either
24 government or the industry. Are you bringing in any
25 of the people in the area whose lives you're

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1 affecting, such as people on Indian reservations or
2 the people who live on the military reservations.

3 MS. VICTORY: At this point, I think we
4 would be happy to talk with some of those folks.
5 We're looking at process issues. I think, in most
6 cases, some of the municipalities or the states that
7 we're talking to would be representing some of those
8 interests but, certainly, if there were unique
9 concerns among those populations, we'd certainly be
10 happy to hear from them. Yes, sir?

11 MR. BRILL: Robert Brill from New York.
12 With regard to the working group and its proposals,
13 what is the ultimate form that the Administration
14 feels it would like to see come out of that? Is that
15 proposed legislation, a proposal for rulemaking from
16 the FCC, or what? Thank you.

17 MS. VICTORY: It may take a number of
18 phases. I think, right now, we are anticipating there
19 will be a report with recommendations for
20 administrative changes in the way the federal agencies
21 do their business. Whether that's a common
22 application, a common web portal, articulated
23 processes, or better information exchange, certainly
24 we would expect that that would come out of it.

25 In the course of our considerations, it

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1 may be that we identify areas in which Congress can
2 provide assistance in achieving those goals or where
3 the FCC could provide assistance in achieving those
4 goals. I don't know whether that will occur or not,
5 but, certainly, the first items that I mentioned, the
6 report and then recommended changes and affected
7 changes to Administration processes, is what we first
8 anticipate will come out of this.

9 AUDIENCE MEMBER: Hi, my name is Marilyn
10 Praisner (phonetic). I'm a council member in
11 Montgomery County, Maryland and involved with the
12 national organizations. I guess I had some visceral
13 reaction to your comment that local government views
14 the industry as trespassers. I've never heard of
15 local government use that term at all, and I just
16 would like to offer the opportunity to follow-up with
17 you because, if we have some examples of that, then we
18 certainly have to deal with it, but I have never heard
19 any local government use the term "trespasser."

20 MS. VICTORY: Well, and I certainly hope
21 that that's not a widespread view of the
22 communications industry. I think what I was trying to
23 highlight is, often, the debate between the land
24 managers and the industry, on the other hand, can be
25 quite contentious, and I think we should be looking at

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1 each other in a cooperative manner in order to foster
2 more of a buy or sell or customer/storekeeper
3 relationship that can ensure that the result is to the
4 benefit of all. But I am certainly hoping that that
5 is not a widespread view among the federal agencies,
6 the localities, or the states. Clearly, that would be
7 a particular problem. Yes, ma'am?

8 MS. BEERY: Hi, I'm Pam Beery. I'm an
9 attorney in Oregon representing local governments and,
10 first of all, I want to thank you for taking the time
11 to be here today. It's important to us that you are
12 here. I was intrigued by a comment you made about
13 your working group taking an in-depth look at some
14 communities.

15 I had a question about how those were
16 selected and who they are, and the follow-up how could
17 governments across the country, who do cooperate in
18 national associations, get more information about the
19 process that you are involved in?

20 MS. VICTORY: Well, actually, that's not
21 going to be the working group, that's just going to be
22 NTIA that will be taking a look at those, and we've
23 actually solicited suggestions, both when I was at the
24 NARUC meeting from some of the state commissioners.
25 I've certainly solicited it from industry and also

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1 from some of the representatives of localities that
2 I've dealt with. We are still gathering information.

3 We do not have a finalized slate of communities at
4 this point. If you have any information you could
5 provide to use with regard to communities or
6 geographic areas that do it right and why that's the
7 case, we'd be very appreciative of the input. And
8 specifics, we very much love specifics. We sometimes
9 get some general nominations, and that's just not
10 enough to base a case study on, but, certainly, it
11 helps to focus our attention. Yes, sir?

12 MR. MELCHER: Good afternoon, Assistant
13 Secretary. I'd also like to thank you for being here
14 and taking the time to spend with us on right-of-way.

15 My name is Chris Melcher. I handle right-of-way
16 issues for Qwest. I was curious, also, if NTIA had
17 begun to look at the nature of right-of-way as a
18 property vis-à-vis other types of property and how
19 that might affect the management of the right-of-way,
20 as well as the charging of fees or addressing the
21 costs of the use of the right-of-way. And what I'm
22 thinking is has NTIA begun to think about whether
23 right-of-ways are held in the proprietary interests of
24 a community or whether they're held in trust for the
25 public and if that affects the analysis. My wife is a

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1 financial officer for the Colorado State Land Board,
2 and the state does actually hold land in an ownership
3 interest. I wonder if you have thoughts on that
4 versus right-of-way, and how that might affect the
5 analysis.

6 MS. VICTORY: Certainly, the legal issues
7 surrounding rights-of-way, surrounding Section 253 are
8 very complex and very interesting from a legal
9 scholar's point of view. I think, at this point, with
10 respect to our federal working group, we are trying to
11 focus in on the administrative processes that we can
12 impact quickly.

13 But you are correct, there are very
14 significant legal issues that need to be looked at
15 here. That may be something that we do in time. I
16 think our first order of business is focusing in on
17 some of the processes that we can improve that are
18 already in place, some of the streamlining that can be
19 done.

20 I know that there's a long history of
21 interest on the part of the FCC, on the part of the
22 states and localities, and on the part of the
23 Administration, as well, in looking at some of these
24 issues, but they're not ones that are going to be
25 resolved particularly quickly, and so, therefore,

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1 we're trying to focus, very practically, on where we
2 can make a difference quickly, and that tends to be on
3 process and procedure. Yes, sir?

4 MR. ASHBUM: My name is Garth Ashbum. I
5 would hope that, when you're looking at that, it would
6 be in the same way that the government looked at, for
7 example, the auctioning of Spectrum, and how that
8 would, you know, the same type of interests of
9 government would play in there.

10 MS. VICTORY: Well, yes, and I think, if I
11 understand what you're referring to, you need to look
12 at it from a legal point of view and also a policy
13 point of view as to what makes sense. Any other
14 questions? All right. Thank you very much.

15 MR. SNOWDEN: Thank you very much for your
16 remarks and your taking time out of your busy schedule
17 to be with us today. I'd also like to acknowledge the
18 Chairman and the Commissioners Abernathy and Martin
19 for also being with us today.

20 We're ready to start our third and final
21 panel. Ken Ferree, the Bureau Chief for the Media
22 Bureau, will be the moderator of that panel, and
23 they'll be looking at issues related to the policy of
24 rights-of-way management and looking ahead. So
25 without further ado. Again, thank you, Ms. Victory.

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1 Thank you, Mr. Chairman and commissioners. We're
2 ready for the third panel.

3 MR. FERREE: Thank you very much, Dane.
4 We are going to start this afternoon's panel, which
5 deals primarily with issues associated with managing
6 the rights-of-way themselves. As Assistant Secretary
7 Victory just noted, we do hear a lot of complaints
8 about this process. Some of the complaints we hear
9 depict rights-of-way management as a cumbersome, time-
10 consuming, confusing, and arbitrary process with
11 burdensome requirements imposed upon telecommunication
12 providers.

13 On the other hand, we hear complaints that
14 companies or their subcontractors are doing careless
15 work, providing inadequate information, doing poor
16 restorations to the streets and roads, and that
17 coordinating projects across multiple jurisdictions is
18 difficult. Often, one side or the other is depicting
19 the other one as not cooperating. Both sides seem to
20 distrust each other. The local citizens are
21 inconvenienced and annoyed. Have I left anything out
22 of this list? Marilyn, have I left anything out of
23 this list? And I can tell you, as a motorcycle rider,
24 the street restoration thing is very important to me.
25 The good news is that, in a lot of places, the

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1 process actually works well. Existing facilities are
2 upgraded, new facilities are built, and the public
3 gets new and better service.

4 This afternoon's panel will explore how
5 those who manage rights-of-way and those who use them
6 can and have worked together to make rights-of-way
7 management a success. Our panelists come from local
8 government, state government, and industry, and all
9 have considerable experience with solving problems
10 experienced in the field, and they're here to share
11 some of those experiences with us.

12 So I think my lead-off hitter today is Bob
13 Chernow, a stockbroker for more than 26 years, who's
14 Vice President of RBC Dane Rauscher in Milwaukee, I
15 think I pronounced that correctly. Mr. Chernow chairs
16 the Regional Telecommunications Commission and the
17 North Shore Cable Commission in Southeastern
18 Wisconsin. The RTC has 27 members, and its
19 communities make up about one-third of Wisconsin's
20 population. Mr. Chernow?

21 MR. CHERNOW: Thank you very much.
22 Utilities have changed the way they operate in the
23 last several years. Much of their construction is
24 subcontracted out, and they make it a practice to
25 lease much of their equipment. In addition,

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1 competition has changed many of the utilities that we
2 deal with from being protectors of the communities to
3 where they're being very competitive of the utilities.

4 This new approach has been driven by economics and
5 has both positive and negative results. It also
6 appears as if construction has increased over the last
7 few years because of competitive pressures, as well as
8 the advent of new services, such as broadband service.

9
10 Competitive pressures, however, have eased
11 recently because of over-capacity in the industry and
12 also the failure of several industry firms.
13 Nonetheless, we see the future as one where business
14 and consumer demand for high-speed internet will
15 continue to increase dramatically over the next
16 several years.

17 In our community, some 27 municipalities
18 in metropolitan Milwaukee or about one-third of
19 Wisconsin's population, we have a very active
20 commission which handles telecommunications and, also,
21 rights-of-way and restoration issues. The first time
22 I've heard anything discussed on restorations is in
23 the introduction to our meetings here. In general,
24 what we've done here is we make our contracts with
25 utilities, basically, as a group. We band together.

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1 We do this, in part, because we're fairly cheap in
2 Wisconsin, and it's fairly expensive to go out and get
3 outside experts and legal services. This is,
4 basically, how we started. We, basically, collect all
5 our assets together and we, collectively, work with
6 the utilities. We have done this very successfully in
7 the past. Importantly, however, each locality, each
8 municipality has to approve what they're doing. I
9 don't think this is necessarily unique throughout the
10 country, but it is very important to us.

11 Where community is somewhat unusual, like
12 the city of Milwaukee, where they own their own
13 conduits where telecommunications and other utilities
14 use their services, it's far different than the normal
15 rights-of-way that you would have in other
16 communities, the base of the contract is used and then
17 they negotiate separately. In principle, again, we
18 negotiate as a group, but we approve contracts
19 individually, and this saves us a great deal of time
20 and, also, the utilities.

21 In creating rights-of-ways and restoration
22 standards, we use the same principle. In the past,
23 one of the problems that we recognize is that
24 utilities coming into our area, we're dealing with all
25 different types of restoration standards and all

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1 different types of rights-of-way standards, and what
2 we've done here is we, basically, have made one system
3 that goes throughout our area and, also, one system of
4 restoration, so that all the utilities and their
5 subcontractors are, basically, working on a level
6 plain; they know exactly what to expect; very, very
7 important. It seems like a very small issue. It took
8 us about two years to do this.

9 Our secret to success, however, is that we
10 did not use municipal officials, elected officials,
11 basically, to do this. I was the only elected
12 official on this group. It was made up, basically, of
13 inspectors from the Department of Transportation,
14 engineers, public works supervisors, and other people,
15 basically, who work on this on a day-by-day basis.
16 They are the ones who really know what the problems
17 are, what the real problems are and what the pretend
18 problems are. They are the ones who know, basically,
19 which utilities give us difficulty and which ones
20 don't. And I emphasize that this practical aspect is
21 something that should be utilized in any dealings with
22 the utilities.

23 One of the things that we discovered after
24 we created these rights-of-way and standards and
25 restoration standards was that most of our

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1 difficulties came from one utility, SBC Ameritech.
2 And before you think I'm going to be critical over
3 here, I want to be very complimentary to them.

4 What we did, basically, is I picked the
5 phone up, I called the president of SBC Ameritech in
6 Wisconsin, and I asked him if he would like to sit
7 down with a group of our people, basically, our
8 engineers and people from the DOT, and to work out the
9 difficulties that we've been having in the past.
10 About a month and a half later, we set up a meeting,
11 basically.

12 The first thing we did was we had an open
13 and frank conversation of the difficulties that we had
14 on both sides because it's not just a one-way street,
15 it's a two-way street. And the solutions we came up
16 with, I think, were very good and, again, very obvious
17 but rarely used in many places around the country.
18 First, to sign up a line of communications to handle
19 complaints. They had one single person that you could
20 go to who would handle the difficulties of backlog
21 that we had.

22 One of the things here was that SBC had
23 just taken over Ameritech, and they had no real vested
24 interest in the problems that had come in the past.
25 They needed to solve it. Also, capitalism was at

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1 work, and they had lost a lot of business in the area.

2 They had a major motivation to solve the problems
3 from the past.

4 The second solution was to have SBC
5 Ameritech agree to put into their contracts a
6 requirement that all their subcontractors meet with
7 the local municipalities to coordinate construction
8 before they started construction. Again, something
9 very obvious but had not been done before. In
10 addition, they agreed to hold money back from the
11 subcontractor until restoration was signed off by the
12 local municipality.

13 Now, what's interesting about this is that
14 many of the subcontractors they're using aren't from a
15 suburb of Milwaukee, Wisconsin. They're from
16 Minnesota, Illinois, Michigan. And once they do their
17 work and had gotten paid, it's hard to go back and get
18 them to do the work, so who do we blame, of course?
19 The local utility. This solved their problem, as well
20 as ours.

21 One area where there was a reluctance for
22 cooperation, with an understandable reason, is when
23 and where future building was to be done. Partly,
24 this is because of the way the utilities plan in a
25 more marketing-like environment and, also, because of

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1 competitive reasons. We understand this, and we've
2 not tried to force the issue. Instead, what we've
3 tried to do, and we should have this completed here in
4 the next month or so, two months, is to work out a
5 system so that we can let them know, basically, how we
6 operate, so that we let them know what our plans are
7 in the future so they can work with us.

8 Cooperation means win/win for all
9 concerned over here. We have a working relationship,
10 also, with municipal electric utilities of Wisconsin.

11 One of their members, Reedsburg, wanted to get a
12 high-speed internet for their communities. They
13 worked out a cooperative agreement with the local
14 telephone company. This is the type of thing where
15 capital can be provided from one group to the other to
16 help out the community that should be utilized.

17 We all want the same thing: good service
18 at reasonable cost for our communities. The Regional
19 Telecommunication Commission has worked with utilities
20 to help accomplish this goal and a work in a win/win
21 manner for all concerned. And that's the thought I'd
22 like to leave with you. Thank you.

23 MR. FERREE: Thank you, Bob. Our second
24 panelist is Dorian Denburg, Chief Rights-of-Way
25 Counsel for BellSouth Corporation. Ms. Denburg

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1 manages public and private rights-of-way issues for
2 BellSouth's nine state regions, overseeing analysis of
3 telecommunications and permitting ordinances, handling
4 rights-of-way litigation at the federal and state
5 level, and participating in the development of
6 legislation pertinent to the telecommunications
7 industry. Ms. Denburg?

8 MS. DENBURG: Thank you very much. I'm
9 very pleased to have an opportunity to come full
10 circle today and close the program where we began.
11 I'd like to commend and thank the Commission for
12 holding this forum, which recognizes that significant
13 problems exist in rights-of-way because I think it
14 presents an opportunity for a new language and a new
15 vocabulary in rights-of-way management: communication,
16 collaboration, and coordination.

17 In order to give force and effect to this
18 new language, I think there's been a lot of discussion
19 today about guidelines, and I believe that the FCC
20 can, in fact, have an instrumental impact on this by
21 promulgating rules that delineate authority to
22 regulate public rights-of-way, to adopt an enforcement
23 mechanism, it sounds like what Bob is talking about at
24 his local level for resolving problems, adopting
25 uniform standards or model regulations for access to

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1 rights-of-way, and, of course, in doing so,
2 recognizing the local governments' police powers.

3 There are principles and practices for
4 rights-of-way management in preventing barriers to
5 entry, which we all can and, I think, should accept.
6 It was mentioned earlier that, in the Commission's 706
7 report, four key measures with respect to right-of-way
8 access were noted, and Assistant Commerce Secretary
9 Victory alluded to these, as well.

10 Delay: we should allow right-of-way access
11 to all entities providing services or deploying
12 facilities and issuing permits within a reasonable and
13 fixed time. And in response to Commissioner
14 Abernathy's question, I think that we would suggest
15 that 30 days is, generally, a reasonable time, unless
16 there's an exigency.

17 I was going to speak about unreasonable
18 fees, but I think that there's been enough discussed
19 about compensation and fees, and I'll move on. Third
20 tier of regulation: there is absolutely no question
21 that local governments have police power to regulate
22 and manage use of the rights-of-way. I believe it was
23 mentioned earlier that nobody in the industry doesn't
24 want local governments not to manage the rights-of-
25 way, and, of course, this is true. We're citizens,

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1 and we live and work in these communities. Local
2 governments have the right and responsibility to
3 protect the traveling public, to ensure their
4 citizens' health, safety, and welfare. Managing
5 rights-of-way is certainly legitimate, but regulating
6 telecommunications providers is not.

7 And lastly, discriminatory treatment:
8 rights-of-way regulations should be generally
9 applicable to all telecommunications companies in the
10 rights-of-way. These principles are embodied in a
11 concrete example that I would like to address of
12 moving beyond roadblock, and that is the Florida
13 Communications Services Tax Simplification Law.

14 We had numerous court cases in Florida and
15 a plethora of problems. The governor created a
16 telecommunications task force, which worked with a tax
17 work group comprised of approximately 34 private
18 sector companies. The recommendations which came out
19 of these two groups were sent to the governor and the
20 legislature. Florida forged a working coalition of
21 key stakeholders: the Florida Cable TV Association,
22 the Florida League of Cities, the Florida Association
23 of Counties, and the Florida Telecommunications
24 Industry Association. There was clearly created an
25 atmosphere of trust and collaboration. There was

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1 strong leadership from key state policymakers, who
2 mobilized to accomplish their goals of fair right-of-
3 way management and equitable taxation. I'm not going
4 to address the equitable taxation aspect of the
5 legislation that was created but, instead, I'm just
6 going to talk about the right-of-way management.

7 The legislation says that no franchise,
8 license, or agreement may be required as a condition
9 to using the right-of-way. Localities may not use
10 their right-of-way authority to assert regulatory
11 control over providers. Rights-of-way regulations
12 must be generally applicable to all rights-of-way
13 users, and rights-of-way regulations must be
14 reasonable and include only those matters necessary to
15 manage rights-of-way.

16 Yes, I am a member of the industry, but I
17 would invite you to speak to any of your colleagues in
18 the municipalities, in the counties, or in the
19 industry in Florida. I believe all of us agree that
20 this legislation has been a tremendous success, and as
21 a result of the legislation, we produced, in
22 collaboration, an ordinance. Do we today have
23 problems? We have isolated problems. They are
24 isolated, they are not everyday problems. And as a
25 result, it has allowed us in the industry and those in

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1 local government to focus on their poor business. For
2 us, it's telecommunication services, and in the
3 government, it's tending to the business of everyday
4 government. We have had similar legislation in South
5 Carolina, similarly a success.

6 In conclusion, these are unprecedented
7 times. Industry wants to work with local government
8 to help them protect their interest in managing the
9 rights-of-way and legitimately exercising police
10 powers, while, at the same time, enabling
11 telecommunications providers to respond to the demand
12 for services leading to economic growth. Government
13 and industry are partners in this, whether we want to
14 be or not. And by working together and speaking the
15 same language, communication, collaboration, and
16 coordination, government and industry can become
17 partners in progress and craft a solution that, as
18 Commission Copps said this morning, is a win for
19 government, a win for industry, and, most critically,
20 a win for consumers. Thank you.

21 MR. FERREE: Thank you, Ms. Denburg. Our
22 third panelist is Ken Fellman, who is a partner in the
23 Denver law firm of Kissinger & Fellman, PC. Mr.
24 Fellman works with municipalities in the development
25 of telecommunications policy documents, rights-of-way

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1 management, tower and antenna siting, and other
2 related telecommunications and land-use issues. Mr.
3 Fellman was elected as mayor of Arvada, Colorado in
4 November of 1999 and, before that, served two terms on
5 the Arvada City Council. I've had the pleasure of
6 getting to know Ken through his work on the Local and
7 State Government Advisory Committee for the FCC, in
8 which he's served since 1997, of which he is now
9 Chairman of that committee. Mayor Fellman?

10 MR. FELLMAN: Thank you, Ken. And I, too,
11 would like to thank the Commission for giving us the
12 opportunity to have this discussion today. We're
13 supposed to talk on this panel about where do we go
14 from here, and I think before we talk about charting a
15 course for where we're going, we need to examine where
16 we are.

17 I think where we are is the level of
18 discourse between the industry and state, federal, and
19 local government, while some of it has been positive,
20 much of it has been less than stellar. All parties,
21 really, have been too willing to say no. All parties
22 have been willing to complain about another party to a
23 third party. All parties have been too willing to
24 seek solutions in adversarial proceedings, rather than
25 talking and trying to hash out the difficult issues.

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1 And if we're going to have discussions that are going
2 to enable us to deal with these very difficult issues,
3 each party must make a real effort to understand the
4 foundational issues of importance to the other. I
5 don't think we've done a very good job of that.

6 On the local government side, management
7 of rights-of-way is, at its core, a local government
8 responsibility. As Lisa Gelb mentioned this morning,
9 local governments have to balance many factors, one of
10 which is telecommunications. It's important, but
11 there are many factors that go into the balancing of
12 how you regulate this asset.

13 Section 253 really does, in our opinion,
14 strike the proper balance, of course, when it's
15 interpreted correctly because it lets the government
16 that's closest to the people manage this very local
17 public asset. It's important to remember, and I agree
18 with one of the industry representatives this morning
19 pointed out that Section 253 doesn't grant any rights-
20 of-way management authority. It doesn't. Rights-of-
21 way management authority pre-dates the
22 Telecommunications Act. It's a function of state and
23 local law. It varies from state to state. And I
24 think if we remember that as part of our discussions,
25 we'll be able to make a lot more progress than we

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1 have.

2 Local governments strongly support the
3 deployment of broadband services, and we are committed
4 to working with all interested parties and committed
5 to educating those of our members who need education
6 on these important concepts. Let me give you a couple
7 of examples. Our national associations, NATOA,
8 National League of Cities, National Association of
9 Counties, U.S. Conference of Mayors, and the
10 International Municipal Lawyers Association got
11 together and published this booklet, "Local Officials
12 Guide to Telecommunications and Rights-of-Way." It's
13 got very helpful information about many of the issues
14 that we're talking about.

15 The Local State Government Advisory
16 Committee, despite some of the comments we heard this
17 morning, I think has been having productive talks with
18 the Industry Rights-of-Way Working Group. They're
19 difficult. There are problems that come up that are
20 very frustrating, but I think, personally, those have
21 been productive discussions. I hope they continue,
22 and I think we can get there from here if we do
23 continue.

24 Local government national associations
25 regularly invite industry and state and federal

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1 representatives in the field of telecommunications to
2 our national conferences to engage in discussion about
3 these issues. Local governments also regularly
4 request and sometimes bet the opportunity to speak at
5 industry and state and federal panels on these same
6 issues.

7 I think the FCC's role should be to
8 facilitate discussions between the parties, and,
9 actually, the FCC has done that in the past and has
10 done it successfully. With the wireless industry, the
11 FCC facilitated discussions between local governments
12 and the industry on the issue of zoning moratoria, and
13 the result of that was a voluntary withdrawal of a
14 preemption petition and a resolution of that problem.

15 The FCC worked with the LSGAC to come up with the
16 radio frequency emissions guide that is now very well
17 known in local government circles, and you don't see
18 the issue of radio frequency emissions coming up at
19 zoning hearings in the way it did previously.

20 I think through education, cooperation,
21 and respectful negotiation, we're going to get to
22 where we need to go faster than through litigation and
23 legislative lobbying. I want to give you one specific
24 example that we have in Colorado.

25 The Greater Metro Telecommunications

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1 Consortium is an agency of 28 counties and cities in
2 the Denver metro area. The consortium got together in
3 the early 90's. In 2000, we decided that it might
4 make sense if we had similar rights-of-way regulations
5 throughout all of our different jurisdictions, so we
6 put together a group to come up with a model right-of-
7 way ordinance. We invited the industry to the table,
8 not just the telecom industry but everyone that's in
9 the right-of-way, gas, electric, water. And some of
10 that worked great and some of it was problematic.
11 What worked good about it was that a number of the
12 folks from the industry who really understood and
13 wanted to respect the local government issue said, We
14 understand where you're going, but if you do it this
15 way, it hurts our business. We think you can do it
16 this way. And it made sense and changes were made,
17 and we ended up with an ordinance that I think has
18 been very successful. One of the ways I judge the
19 success of that is that we haven't seen any litigation
20 over it.

21 Do I recommend that everywhere? You know,
22 we've heard a lot of talk today about best practices.

23 No, I don't, and I think the most important thing we
24 can learn about best practices is that there are no
25 best practices that will work everywhere in the same

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1 way. There are good practices, there are success
2 stories that we need to take advantage of and we need
3 to learn from, but what works in Erie, Pennsylvania
4 doesn't necessarily work in Erie, Colorado.

5 I think we need to really focus on what
6 can we learn from these best practices without
7 mandating them on anyone. This forum is part of the
8 process of sharing that information, but I would ask
9 everyone to think a little bit about the difference
10 between disseminating information, which I think we do
11 well, and communicating, which I don't think we do
12 very well.

13 This rights-of-way book that I mentioned
14 earlier has been distributed to industry and the FCC
15 and NARUC, and we haven't heard back. I talked to the
16 principal authors of it. No one has heard back, this
17 is great information, it's bad information, it's
18 accurate, it's inaccurate. We need to take these bits
19 of information that we're sending back and forth and
20 really talk about what works and what doesn't work.

21 Let me close by just making a couple of
22 comments. If we have a better understanding and
23 respect for where each side is coming from, if we take
24 sufficient time to educate each other and ourselves
25 about what we need to get accomplished, if we look at

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1 what has worked in other communities and learn from it
2 but don't expect somebody to mandate on you, whether
3 it's a guideline or a best practice or a regulation --
4 actually, there's always one exception to every rule,
5 so let me make an exception to that one. If
6 Commissioner Abernathy can figure out a way to get a
7 right-of-way across her daughter's room that you
8 talked about this morning, I will mandate that in my
9 household.

10 I think the FCC, and Congress to a lesser
11 extent, can facilitate the cooperative dialogue by
12 sending a message that they will not get involved in
13 adversarial proceedings unless the parties have really
14 taken the time to work these issues out. I think a
15 lot of times we spend too much of our resources
16 responding to adversarial proceedings or responding to
17 FCC questions or notices of inquiry, when we could be
18 sitting at the table trying to work these problems
19 out.

20 The bottom line is, you've heard from a
21 number of speakers this morning, that there's no
22 federal jurisdiction to preempt local rights-of-way
23 practice. I believe that's what the statute says.
24 That being said, local governments are willing to come
25 to the table and discuss ways to streamline the

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1 process, but they won't stand for getting steamrolled
2 in that process. Thank you.

3 MR. FERREE: Thank you, Mayor Fellman.
4 Our fourth panelists is Sandy Wilson, the Vice
5 President of Public Policy for Cox Enterprises, Inc.
6 in Washington, D.C. Before joining Cox in 1994, Ms.
7 Wilson had a job that's near and dear to my heart.
8 She was Chief of the Cable Services Bureau here at the
9 FCC. And before that, she served as legal advisor to
10 Chairman Al Sikes. She should bring an interesting
11 perspective of a company that is both a cable operator
12 and a competitive telecommunications carrier. Sandy?

13 MS. WILSON: Thanks very much. I'm happy
14 to be here, and I was even happier to be here after
15 hearing some of the comments said about the cable
16 industry this morning. As many of you know, Cox
17 Communications is the fifth largest cable company in
18 the country. We serve over six million subscribers.
19 What you might not know, though, is that this is our
20 40th year in the cable business, and that means, of
21 course, that it's our 40th year of dealing with public
22 rights-of-way issues. And just as the business as
23 evolved over time, so have the many rights-of-way
24 issues that we've had to grapple with. When we first
25 got into the business in 1962, we just offered what I

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1 would call POTS, plain old television service. And
2 now 40 years later and six years after passage of the
3 Act, we are a full-service broadband provider. We
4 offer not only a range of video products, but also
5 high-speed internet access and local competitive
6 residential phone service over the same integrated
7 plant. I'm happy to say that all of these new
8 products have been eagerly embraced by our customers.

9 It's fair to say that Cox employees have
10 faced enormous and exhilarating challenges developing
11 and deploying these new services over our upgraded
12 cable networks. Each service is unique and requires
13 its own distinct commitment of capital expertise in
14 human resources. At the same time, each service has
15 to be closely coordinated with the other because we
16 have to provide an integrated seamless experience to
17 our customers.

18 In many ways, I think policymakers face a
19 similar challenge. As the marketplace becomes
20 increasingly competitive and lines between incumbents
21 and new entrants blur, government and industry must
22 develop a coordinated approach to rights-of-way
23 management. It was policymakers who asked us long ago
24 to get out of our old lines of businesses and start
25 competing with other folks, and it's government

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1 policymakers who have encouraged us to begin the
2 deployment of broadband services. And the cable
3 industry, I think, has heeded those calls, and we are
4 now at the forefront of offering a range of services.
5 But we do feel a little bit lost in the regulatory
6 woods when it comes to figuring out what the rules of
7 the road are when you're offering different types of
8 services over an integrated infrastructure.

9 So let me tell you a little bit about some
10 of the challenges that we face as cable operators and
11 then give some suggestions on how we can move forward.

12 Although we're not unlike other rights-of-way users
13 in many respects, we are unique, I think, in two
14 important respects. First, the relationship between
15 cable companies and local governments is more
16 extensive than is often the case with other rights-of-
17 way users, such as incumbent telephone companies. In
18 addition to working closely with local governments on
19 rights-of-way management issues, cable television
20 services, traditionally, have been subjected to
21 additional local regulation, and, as a result, the
22 cable industry has forced a unique relationship with
23 local government that is rarely shared by other
24 communication service providers. In fact, most cable
25 operators see themselves as partners with their local

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1 communities, and they work extremely hard to foster
2 close and strong relationships.

3 We are also unique, at this point in time,
4 in another critical respect, and that is that we are
5 usually the only facilities-based provider in our
6 communities offering a range of services over one
7 infrastructure. As you all know, our video services
8 or cable services regulated under Title 6. Our local
9 phone services or telecommunication services is
10 regulated under Title 2, and we learned last March
11 that our high-speed internet access services or
12 information services, which are governed by Title 1.
13 And the reality is we know, generally, what the rules
14 of the road are for video services. They're governed
15 under Title 6, and we're starting to get some greater
16 clarity about what the rules of the road are for Title
17 2 service providers, although there's obviously still
18 a lot of debate about that. But once you throw Title
19 1 services into the mix, you get, you know, the
20 regulatory debate gets even hotter.

21 So the result is that we've spent a lot of
22 time over the last six years talking with our local
23 regulators about how to resolve some of these issues,
24 and, in many cases, the discussions are cordial, and
25 we've been able to move forward with very little

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1 resistance.

2 And I'd just like to mention quickly our
3 experience in Omaha, Nebraska because I think it's an
4 excellent example. With the extensive cooperation of
5 local government officials, we were able to deploy
6 both competitive phone service and high-speed internet
7 access smoothly and efficiently in Omaha. They did
8 not enact new ordinances. They did not require
9 additional franchises. They relied on existing
10 permitting processes, and they moved things right
11 along. And, indeed, they did the same thing for
12 Qwest, and we enjoyed very speedy action, as did
13 Qwest, and, as a result, we now have Qwest and Cox go
14 head-to-head, providing the full-range of services in
15 Omaha. We've got a very, very vibrant competitive
16 landscape there, and I think it's, in large part,
17 thanks to both the state of Nebraska statutes and,
18 also, the commitment of local regulators.

19 We do run into problems, however, in some
20 communities, and they are similar to the ones other
21 face. And then we had the unique issues of, you know,
22 do you need to get another franchise if you're
23 offering telecommunication service and you already
24 have a cable franchise? Do you have to pay every time
25 you roll out a new service? And we've had a

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1 particular problem placing some back-up power supply
2 cabinets in rights-of-way, which enhance the
3 reliability of our networks.

4 But we have found that there are ways of
5 working through these issues, and I'd like just to
6 mention a few. First, I'll just add my voice, another
7 industry voice, to requesting that the FCC take up at
8 least some of the key questions involving
9 interpretation of the Communications Act provisions
10 dealing with the interplay between Title 6, Title 2,
11 and Title 1. That would be great for cable operators
12 and their local regulators if we had some greater
13 clarity there.

14 We very much believe we are longstanding
15 users of the rights-of-way, that a cooperative
16 approach to dealing with the day-to-day management
17 issues is the best way to go, and we do lock ourselves
18 into rooms with local regulators when we get stuck
19 sometimes and try to hash things out. And often those
20 cooperative efforts really do bear fruit, so we are
21 very much committed to that. We do like very much the
22 fact that policymakers at all levels of government are
23 now getting greater visibility to these rights-of-way
24 issues and are talking about best practices, and,
25 while it may be that there's no one set of practices

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1 that every could follow, I think the fact that we get
2 more examples out there will be that much more useful.

3 And lastly, we are supportive, as an industry, of the
4 states' efforts to take on these issues and adopt
5 statewide measures because the reality is certainty
6 goes a long way, and even if you're not in total
7 agreement with the end result, at least you know how
8 to proceed, and we can all go about our business of
9 providing new services to customers. Thank you.

10 MR. FERREE: And our final panelist is
11 Robert Nelson, who is a commissioner at the Michigan
12 Public Utility Commission serving a term that ends in
13 2005. Mr. Nelson served as President of the Michigan
14 Electric and Gas Association from December 1987 until
15 his appointment to the commission in 1999. From 1979
16 to 1987, he was Director of the Michigan Commission's
17 Office of Regulatory and Consumer Affairs. Mr. Nelson
18 serves on NARUC's consumer affairs committee and the
19 telecommunications committee, of which he is co-vice
20 chairman. Mr. Nelson also is a member of the FCC's
21 North American Numbering Council.

22 MR. NELSON: Thank you, Ken. Thank you to
23 the members of the Commission, who invited me here to
24 speak today and also participate in this conference
25 and for giving me the last word, I guess, today on

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1 this very vigorous and public-spurred debate. The
2 purpose of this panel was to offer positive
3 recommendations, and many of the panelists have done
4 so, and I intend to do the same. I'll rely heavily on
5 the NARUC Study Committee report that was issued
6 earlier this year, which did deal with positive
7 recommendations.

8 This is just a pictorial display of some
9 construction of right-of-way put together by Florida
10 staff. This is a significant quote, which will appear
11 on the screen shortly. When Euclid theorized that the
12 shortest distance between two points is a straight
13 line, he didn't take into account that there might be
14 public rights-of-way in between the two points. I
15 think that's pretty obvious from what we've heard
16 today.

17 There certainly, as Alexandra just
18 mentioned, a significant role for the states in this
19 whole debate. We haven't heard a lot about that
20 today, but if you look at Section 706 of the 1996 Act,
21 it does say that each state commission shall encourage
22 the deployment on a reasonable and timely basis of
23 advanced telecommunications capability to all
24 Americans, and that would include measures that remove
25 barriers to infrastructure investment. So we have the

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1 state role there.

2 Also, as we've talked about earlier today,
3 Section 253(a), on the other side of the scale, makes
4 sure that the states and local governments do not have
5 ordinances or requirements that prohibit or have the
6 effect of prohibiting the ability of any entity to
7 provide intrastate or interstate telecommunications
8 service. Mr. Knight had indicated that right-of-way
9 humor was an oxymoron. This is, perhaps, an attempt
10 to belie that. If you can read the quote from the
11 fellows walking across the golf course, but the fellow
12 who is not being hit by the golf ball says, "Stop
13 moaning, Norman. There's a public right-of-way on
14 this golf course."

15 As we've heard throughout most of the day
16 today, there are a number of problems that have been
17 identified. Again, as NARUC discovered, this is not
18 true in all communities. In fact, not even a majority
19 of communities. But certainly, we have identified
20 these various issues, as well as others. The
21 unreasonable delay in getting permits, the excessive
22 compensation, conditions unrelated to rights-of-way
23 management, requirements to waive legal rights in
24 order to gain access, requirements contrary to state
25 law and discriminatory terms and conditions. This is

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1 a graphic display of some of the right-of-way problems
2 that some communities are facing. I think it dates
3 back to the turn of the last century.

4 As a result of those problems that were
5 identified, NARUC, in February of last year, adopted a
6 resolution, and it identified these problems in the
7 resolution and called for the creation of a study
8 committee to deal with these problems and bring
9 forward recommendations. And that's where we get the
10 Study Committee. There were five topic areas for the
11 topic areas for the Study Committee, and each topic
12 committee had a commissioner, a state commissioner in
13 charge of that particular topic area: public lands,
14 Commissioner Kjellander from Idaho; myself from state
15 legislation; state and local policy initiatives,
16 Commissioner Cartagena from right here in the D.C.
17 area; federal legislative and policy recommendations
18 from Commissioner Deason from Florida; and
19 condemnation recommendations from Commissioner Burke
20 of Vermont.

21 The Study Committee, after the resolutions
22 adopted in February, had several meetings, conference
23 calls, e-mail exchanges, and created a report which
24 contained model state legislation and contained a
25 number of recommendations. Finally, the NARUC

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1 resolution was adopted this summer. The participants
2 in this Study Committee debate included all the
3 players that we've heard from today, some of the major
4 carriers, NATOA, NCTA, and the National League of
5 Cities.

6 I won't go into too much about this,
7 except to say that the Study Committee did bring
8 forward this report, the NARUC reviewed it and,
9 although the NARUC did not endorse it all in respects,
10 it did say that it should be carefully reviewed. We
11 have brought copies here today. We encourage you to
12 review it. It does have supplemental views from both
13 the cities, local governments, and from industry.

14 Public lands, as Nancy Victory talked
15 about this afternoon, is a very significant issue. I
16 won't go into a lot of detail here, but the two issues
17 identified, as you can see on the screen, are the
18 delays from federal agencies and also the excessive
19 fees some agencies charge at the federal level.

20 State legislation: what we did was to
21 survey 19 different states. Most of these states had
22 passed legislation since the '96 Act, and we
23 identified the best ideas, developed a list of best
24 practices, and, again, I would accept Mr. Fellman's
25 characterization of maybe not best practices but some

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1 good practices, and we created some model state
2 legislation. Some of this legislation is modeled
3 after the Michigan law that passed earlier this year,
4 but let me just very quickly highlight some of the
5 features in it that are relevant to the positive
6 recommendations. We dealt with timeframes, and not
7 only did we have specific timeframes that were
8 recommended for a permit to be approved but, also,
9 during the course of a dispute, the state could order
10 local government to authorize that permit to be issued
11 pending that dispute, so that the construction could
12 begin and the rest of the issues could be resolved
13 later on.

14 With regard to the fee, we had two
15 choices. I think it's very important. One is the
16 fair and reasonable cost standard, and the other is a
17 fixed fee, which is what we adopted in Michigan. You
18 may ask how do we get all the local governments in
19 Michigan or most of them and the providers to agree to
20 a fixed fee? Well, it was very simple because we did
21 maintain local control. Local governments in Michigan
22 still have the management of the right-of-way under
23 their purview. The state administers the fee process,
24 however. And that fee is nondiscriminatory. It meets
25 the White Plains test, in my view.

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1 We dealt with restoration, and we dealt
2 with remediation, which I think is important for
3 getting groups together and solving problems absent
4 litigation. And just very quickly with the next slide
5 because John Mann would quick me if I didn't show
6 this. Some federal legislative and policy
7 recommendations, and this is in the report, I'll just
8 put it up on the screen. Again, this is not intended
9 to have the FCC preempt states or local governments
10 but to have the FCC promote best policies. And that's
11 what the FCC can do is to clarify their role here, add
12 some certainty to the process, and I think even if
13 they do step in, it's important that state and local
14 governments work together in a cooperative manner, and
15 we must work together to remove barriers to entry.
16 Thank you very much.

17 MR. FERREE: Thank you. I see we have
18 almost 20 minutes left, so we're going to have some
19 time for some questions. I think, as moderator, I
20 probably get to start. Dane asked me to moderate this
21 panel. I said I'd be happy to be moderator, but I'm
22 often more comfortable in the role of agitator, as
23 opposed to moderator, so I'm going to jump right into
24 that role now and start with Bob down there.

25 Bob, you suggested in your comments a

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1 rather limited role for local elected officials, and
2 I'm sort of curious about that. I mean, it seems to
3 me a lot of this involves not just technical questions
4 but, really, policy questions, and these are the
5 folks, after all, that hear the most from their
6 constituents and maybe best appreciate the value of
7 the property that we're talking about. So can you
8 elaborate on that?

9 MR. CHERNOW: I'm actually a local
10 official myself, and we had one other, when we met
11 with Ameritech, we actually had one other elected
12 official. But the reality of it is that they are
13 technical issues on a local basis, and those are the
14 problems that we run into on a case-by-case basis. So
15 my advice would be to continue to use this. Also,
16 importantly, they're the ones who actually enforce the
17 regulations.

18 MR. FERREE: Libby?

19 MS. BAILEY: Hi, Libby Bailey with NATOA.
20 Ms. Denburg, I wanted to ask a question, and I'm not
21 sure whether or not you'll know, but I was curious
22 about whether or not you had had any success in
23 collecting any data in states such as Florida and
24 South Carolina? I think Michigan is probably too new
25 in its legislation. But is the correlation between

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1 the change in regulation and an increase in broadband
2 deployment?

3 MS. DENBURG: (Inaudible).

4 MR. FERREE: Yes, sir?

5 AUDIENCE MEMBER: Hi, my name is David
6 Milken (phonetic). I'm with Verizon, and I have a
7 question for clarification for both Mr. Fellman and
8 Mr. Chernow. Under your scenarios, in your various
9 communities or your consortium of communities in which
10 you had coordination, communication, and cooperation,
11 it's my understanding that that was with respect to
12 management of the rights-of-way issues and not issues
13 such as franchising authority or fees, of which I
14 understand that in the Colorado instance, the state
15 statutes outline what your authority is with respect
16 to regulating telecommunication providers and granting
17 franchising, and in Wisconsin, with respect to the
18 undertaking that's being made at the Wisconsin PSC
19 with regards to rulemakings.

20 MR. FELLMAN: As far as Colorado goes,
21 you're correct. We have state legislation which,
22 basically, takes local governments out of the
23 franchising process and does not allow recovery of
24 fees above the actual cost of the use of rights-of-
25 way. Actually, to tie that into Ms. Bailey's

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1 question, there's no documented evidence, and that
2 legislation has been in place since 1996, there's no
3 documented evidence that we have a more wider roll-out
4 of broadband services in Colorado without having any
5 of those franchise requirements or fees. So take that
6 for what it's worth.

7 But the issue that was actually our
8 biggest hang-up, Dave, in that discussion was not fees
9 above costs, it was how do you determine the costs?
10 What are the degradation fees? How do you determine
11 what to charge every time a street is trenched?

12 And I mentioned some of the things that
13 worked in the negotiation, and we did have some very
14 proactive and positive industry members who helped us
15 with this legislation. We also had some, and one of
16 them, confidentially, came up to me after the process
17 and apologized and said, Our instructions from our
18 company was to participate in your process and to do
19 absolutely nothing that would bring this to consensus,
20 so that's why we were difficult to deal with through
21 the process. And we got into fights over, well, how
22 did you determine how much those degradation fees
23 should be? Well, we looked at this study and that
24 study, and, Well, we don't like any of those studies.
25 Well, if we do a new study, will you accept that?

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1 Well, no. We've actually never, we've never seen a
2 study on degradation costs that we agree with. So we
3 said, All right, how about if you guys do a
4 degradation study, and we'll examine it and take it
5 under consideration. The response was, Well, we're
6 not the government, we're not going to pay for a
7 degradation fee study.

8 So, again, it's one bad example, and we
9 still got a good product out of this, but there is
10 some difficult issues to deal with, despite the fact
11 that we never talked about franchises or franchise
12 fees because we don't have state authority to do that.

13 MR. CHERNOW: Well, actually, the people
14 who have come to us have not only been cable
15 operators, but we've had some interesting groups of
16 people who have come to us who want to be, basically,
17 regulated as a cable operation, even though they're
18 also doing telecommunications and they're also doing
19 high-speed internet, and we do have the right to work
20 out an arrangement with them. We handle our
21 restoration systems in a somewhat different way. We
22 have very strict restoration standards that we want to
23 have implemented, and we, basically, have the utility
24 implement it. If they don't, and we've never had a
25 case like this, we will actually then go in after a

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1 period of time and do the work ourselves and then
2 charge back the utility. But we've never had to go to
3 that extent to do that. To a great extent, it's
4 letting people know what the standards are that we
5 want them to go to, and they're very cooperative in
6 that respect.

7 MR. FERREE: Mayor Fellman, your comments
8 also made me think of something else you said earlier
9 about the FCC might have a role in fostering
10 discussions or sort of a mediation role. Is there any
11 role like that for state utility commissions as
12 mediators in these sorts of, when disputes arise?

13 MR. FELLMAN: You know, I think it depends
14 on, it's probably a function more of state law and how
15 active the state commissions want to get. I think
16 state legislators can serve in a mediation role,
17 governors offices can serve. I don't dismiss any
18 level of government or any office within government
19 from serving as a role to bring parties together and
20 try to get these issues resolved. But, you know, I
21 think an important part of that, and it's something
22 that hasn't been mentioned here as we talk about the
23 scope of authority, I haven't heard any of the
24 speakers mention the 10th Amendment yet and the
25 principles of federalism.

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1 MR. FERREE: I thought there were only
2 eight.

3 MR. FELLMAN: Well, we went to different
4 law schools. You know, really, the issue is, before
5 we talk about preempting, whether it's state
6 preempting local or federal preempting state or local,
7 we need to determine what really is the scope of the
8 problem and is preemption appropriate. I appreciate
9 Commissioner Nelson's comment and I've heard some
10 other speakers say that not all or even most local
11 governments are imposing problematic regulations.
12 Well, if that examination of the problem would
13 indicate that there's no need for preemption, then any
14 level of government and any agency within the
15 government that wants to try to bring the parties
16 together and do the harder work of resolving these
17 issues as they come, as opposed to a broad federal
18 rule, yes, I think it would be appropriate.

19 MR. FERREE: Commissioner Nelson, do you
20 have a reaction?

21 MR. NELSON: Yes, I do have a reaction.
22 We had a situation in Michigan where we had one
23 community that was holding up a major fiber deployment
24 project, and all the other communities had agreed very
25 amicably to a fee structure, etcetera, but this one

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1 community held us up for several years, and I think
2 that's the kind of issue that you want the state to be
3 able to jump in and try to mediate. We were able to,
4 through the Commission's efforts, turn that around by
5 finding the community that was involved. But I think
6 the state has an important role here, and, certainly,
7 I would agree with Ken that we want to avoid federal
8 preemption, if at all possible, but I don't think the
9 10th Amendment talks about the states and the local
10 government relationship.

11 MR. FERREE: Okay. Ms. Denburg, you look
12 like you would like to □-

13 MS. DENBURG: Yes, what I was going to say
14 is I think that we discussed jurisdiction and
15 preemption a bit this morning, so I don't want to go
16 back to that. But just to pick up on Mayor Fellman's
17 comment that no best practices work everywhere and the
18 example, you know, Erie Pennsylvania doesn't work in
19 Erie, Colorado, if you will. I think, however, that
20 still there can be a tremendous benefit in setting, if
21 you will, ceilings and floors and what is not
22 acceptable and what is. And it's really very
23 critical, I think, that, particularly at a state
24 level, you can come together and figure out what works
25 in the state, and you cannot have one standard or 400

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1 standards, let's say, in the municipalities in Florida
2 and a difference 750 in Georgia, for instance, for
3 BellSouth or any provider that's working in
4 BellSouth's region. And I think that's the key is
5 that, you know, you're talking about, well, you
6 shouldn't have the fed preempt the state.

7 The bottom line is I think that there
8 should be recognition that, in a wholesale manner, we
9 can accomplish a lot and come to agreement on certain,
10 you know, whether it's regulations or rules of
11 deployment and relationships, and I think that the
12 broader scale they are, the more their set out, the
13 more everybody knows what the rules are, then you can
14 live within the rules. But if you have to guess every
15 time you're in it, and, of course, BellSouth is an
16 incumbent provider so we don't have some of these
17 issues, but as a new entrant, if you have to guess at
18 the rules every time you're coming in, that's a cost
19 of business that, in and of itself, is a barrier.

20 MS. WILSON: And I thought it was
21 interesting that, of all the examples that were given
22 by the panelists, that we were all talking about
23 states in which the states had adopted legislation
24 that spelled out what the rules of the roads were in
25 Michigan, Nebraska was my example, Florida, and

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1 Colorado.

2 MR. FERREE: Okay. Yes, I know you're all
3 anxious. Just one second; I got to get one more in
4 here for Sandy. Why shouldn't you go into your
5 comments about your company's providing a lot of
6 different services and this question about, well, if
7 we start providing a new service through an existing
8 right-of-way, should that be subject to new fees and
9 new regulation? From a competitive standpoint, just
10 in terms of competitive neutrality, why shouldn't you
11 pay? If you're doing cable services, you're regulated
12 as a cable operator, you pay as a cable operator.
13 When you enter in the telecom market, why shouldn't
14 you pay whatever other telecom service providers are
15 paying for that service and being regulated as such?

16 MS. WILSON: I think it would be probably
17 a big step forward in some communities if that's what
18 the rules of the road were. I mean, I think we do pay
19 probably more than any rights-of-way user through the
20 cable franchise fee, which is a nice chunk of change,
21 and other in kind benefits. So I think you certainly
22 make a very good argument that the payment that is
23 made, regardless of whether you're offering your
24 services, is more than enough to compensate for our
25 rights-of-way use.

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1 But even if you were to put that to one
2 side, what we often find is that we are asked to pay
3 five-percent of our revenue for every new service we
4 roll out. Let's say, for example, our local phone
5 service. We had communities where we were asked to
6 pay five-percent on those revenues, and the incumbent
7 is not paying anything, and that is clearly a
8 competitive disadvantage.

9 MR. FERREE: Okay. Some of these folks
10 definitely want to get another shot in here. My
11 friend from NCTA.

12 MR. SUMMERMAN: Rick Summerman from the
13 National Cable and Telecommunications Association. I
14 actually wanted to tie, I guess, your last question to
15 Sandy and the Florida situation that Ms. Denburg
16 raised. Back to the last panel on compensation, and
17 one of the outstanding questions from that panel was,
18 you know, why doesn't the industry seem to want to pay
19 the value or the worth or rent for property? But I
20 think what's missing in the debate, and I know it's
21 not really an FCC role, but is the tax question. I
22 had the tremendous pleasure of working on the National
23 Tax Association Communications and Electronics
24 Commerce Project looking at tax simplification, and it
25 turns out, if I'm recollecting correctly, that

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1 telecommunications comes right after cigarettes and
2 liquor as the most highly-taxed industry, whereas
3 we're not looking, you know, to the FCC to do
4 something about telecommunications taxes, I think you
5 have to recognize when you say, gee, you're not paying
6 your fair share, telecommunications industry. You
7 have to say, well, what's happening on the tax front?

8 And if it's a tax of general applicability, that's
9 one thing; but if it's a tax burden only on
10 telecommunications providers, that's another thing.
11 So to bring it back to the question to Sandy, you
12 asked about telecommunications, on telecommunications
13 services, they pay the same taxes when they're a CLEC
14 or an ILEC □-

15 MR. FERREE: Is there a question in here
16 Rick somewhere?

17 MR. SUMMERMAN: There is for Ms. Denburg.
18 I'm wondering if Ms. Denburg can, just in the Florida
19 situation, describe how -- the change they made was
20 not just about rights-of-way, they rolled in all
21 telecommunications taxes.

22 MS. DENBURG: Correct. The key of the
23 Florida legislation, there were a couple of points,
24 and it's in my handout, but one of the things that
25 they did, it had revenue neutrality so that any local

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1 government getting revenue kept the revenue. But it
2 also, for our tax folks, had administrative simplicity
3 and ease, in terms of auditing, as well. Instead of
4 being audited by 400 municipalities, there's one
5 centralized audit.

6 But the key, in terms of what you're
7 speaking about, Rick, is the competitive neutrality.
8 And what we moved away from was using the rights-of-
9 way for discriminatory franchise fees and, instead,
10 moved to a competitively neutral flat tax. We
11 broadened the base. And, generally, when I speak in
12 front of other folks and talk about tax, I say that
13 tax is not a four-letter word. What the taxes on DBS,
14 satellite, cable, wireless, telephony, and it removes
15 the right-of-way as the vehicle for taxing, puts it on
16 the services.

17 MR. FERREE: All right. It's been a very
18 long day, and I think we need to start to wrap this
19 up. Let's do one more from the crowd. This gentleman
20 here.

21 MR. LLOYD: Frank Lloyd from Mintz Levin
22 law firm representing cable companies. Ken, this is a
23 question to you.

24 MR. FERREE: You don't understand the
25 format here.

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1 MR. LLOYD: Has anything happened with the
2 notice of inquiry on rights-of-way regulation that was
3 put out about three years ago and all the comments □-

4 MR. FERREE: That's in Dane's shop now.

5 MR. LLOYD: And there's a hesitancy on the
6 part of the Commission to have regulation in this
7 area, wouldn't it be possible to have a number of hoe-
8 downs in this area, like the ones over the digital
9 television transition? It seems to me this is as
10 important to the future economy of this country as
11 digital television, if not more so. And hoe-downs
12 would require your participation.

13 MR. FERREE: Fair enough. And, in some
14 sense, maybe this is the first of the hoe-downs, I
15 don't know. But it's a fair point, well taken. I
16 think we have to wrap up. I'm sorry, folks. Thanks.

17 MR. SNOWDEN: Thank you, Ken. As you can
18 tell, he definitely does a good job of being the
19 agitator and passing the buck, as well.

20 I guess, to steal a line from Mr. Ferree,
21 spring is probably the best time we'll have something
22 coming out. That's a little inside joke.

23 I want to thank the panelists today.
24 Thank you very much for your insight and thank all of
25 you for participating today and all of you who

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1 participated as panelists and speakers. As Chairman
2 Powell said in his opening remarks, we did not attempt
3 to deal with all aspects of all issues touching upon
4 the use and management of rights-of-way. Indeed,
5 there are many other rights-of-way issues that impact
6 other industries and services. Today's forum should
7 serve as a useful mechanism to move forward in
8 partnership with local and state governments and
9 members of industry in addressing the many difficult
10 issues relating to the management of rights-of-way. I
11 think we're well on our way to a good start.

12 Although we have focused primarily on the
13 concerns of industry and local governments, it would
14 be remiss of me to allow this forum to conclude
15 without an acknowledgement of the many consumers that
16 are affected by the resolution of rights-of-way
17 issues. Of course, as Chief of the Consumer and
18 Governmental Affairs Bureau, I have to put that in
19 there. I can assure you that the Commission remains
20 cognizant of its responsibilities to consumers in
21 these matters. The quick and efficient deployment of
22 telecommunications services, along with the necessary
23 maintenance and upkeep of public rights-of-way, are
24 important to every citizen in our society. This is
25 the thought that should guide us as we move forward.

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1 Now if you can allow me, as emcee, to take
2 a point of privilege. I would like to acknowledge two
3 people who have allowed me to stand up here and look
4 good because they actually deserve all the credit for
5 pulling off this forum, and that is Linda Kinney from
6 the Office of General Counsel, and Chris Montief
7 (phonetic) from my bureau, the Consumer and
8 Governmental Affairs Bureau, so thank both of them.

9 And with that, I send you out to the brave
10 new world of the rain and enjoy yourselves and thank
11 you very much. We are adjourned.

12 (Whereupon, the foregoing matter was
13 concluded at 3:33 p.m.)

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